Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSEFINA CRUZ

Petitioner

V.

NEW YORK CITY DEPARTMENT OF EDUCATION, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendices

Josefina Cruz, *Pro Se*
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of May, two thousand ten.

PRESENT: JON O. NEWMAN,
REENA RAGGI,
PETER W. HALL,
Circuit Judges.

Appendix A

JOSEFINA CRUZ,

Plaintiff-Appellant,

DIANA HRISINKO, ANDREA SHAPIRO, DIANA LEE FRIEDLINE, ISMAEL DIAZ, ANTHONY FERRARO, ELAINE JACKSON, MIDGE MARONI, DAVID MCMULLEN, RAM NARINE, GERALDINE WHITTINGTON, GLORIA CHAVEZ, FITZROY KINGTON, ERICA WEINGAST,

Plaintiffs,

v. No. 09-0942-cv

NEW YORK CITY DEPARTMENT OF EDUCATION, GRAPHIC COMMUNICATION ARTS HIGH SCHOOL, JEROD RESNICK, DOMINIC CIPOLLONE, EDWARD DEMEO, JACQUELINE KENNEDY ONASSIS HIGH SCHOOL, M.S. 219, ERIC BRAND, JUDITH SILVERMAN,

Defendants-Appellees.

APPEARING FOR APPELLANT: JOSEFINA CRUZ, *pro se*, New York, New York.

APPEARING FOR APPELLEES: KAREN M. GRIFFIN, Appeals Division, *for* Michael Cardozo, Corporation Counsel of the City of New York, New York, New York.

Appeal from a judgment and order of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the October 15, 2008 judgment and January 5, 2009 order of the district court are AFFIRMED.

Plaintiff Josefina Cruz, a former New York City schoolteacher, appeals pro se from the district court's denial of her Fed. R. Civ. P. 60(b) motion for relief from a judgment in favor of defendants, following a jury trial, on her employment discrimination and retaliation claims under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12112 et seq., the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq., and 42 U.S.C. § 1983. See Friedline v. N.Y. City Dep't of Educ., No. 06 Civ. 1836, 2009 WL 37828 (S.D.N.Y. Jan. 5, 2009). On appeal, Cruz renews two arguments raised in her Rule 60(b) motion: that the district court erred by (1) granting defendants' Fed. R. Civ. P. 50(a) motion for judgment as a matter of law with respect to certain of her age discrimination claims and (2) placing a time limit on the trial testimony of certain witnesses.[1]

We review the denial of a Rule 60(b) motion for abuse of discretion, which exists only where the district court's ruling is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 729 (2d Cir. 1998) (internal quotation marks omitted). In applying this standard, we assume familiarity with the facts and procedural history, which we reference only as necessary to explain our decision to affirm.

1. The Rule 50 Award

A Rule 50 motion may be granted only if "no reasonable factfinder could return a verdict against the movant." Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999). Here, the undisputed trial evidence showed that another teacher, significantly younger than Cruz, was treated in an identical manner after failing to administer a portion of a Regents examination, i.e., the younger teacher received an

[1] Cruz also raises several arguments not presented in her Rule 60(b) motion, which are addressed infra at 4-5.

unsatisfactory performance rating for 2006 and was transferred to the Regional Operations Center. We detect no abuse of discretion in the district court's conclusion that such evidence precluded a jury verdict in Cruz's favor on her age discrimination claims based on the 2006 performance rating and transfer that followed her own failure to administer a portion of a Regents exam. See Grady v. Affiliated Cent., Inc., 130 F.3d 553, 561 (2d Cir. 1997).

2. Limits on Witness Testimony

A trial court's discretion with respect to "the regulation of the course and scope of examination of witnesses" is "broad indeed." United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 44 F.3d 1091, 1095 (2d Cir. 1995). Even an erroneous evidentiary ruling will warrant a new trial only where "a substantial right of a party is affected." Arlio v. Lively, 474 F.3d 46, 51 (2d Cir. 2007). Here, it was only after counsel made several inaccurate predictions about the length of time needed for examining witnesses and prolonged examination with objectionable lines of inquiry that the district court imposed, without objection, a two-hour limit on certain witnesses' testimony. Nothing in the record indicates that this action hampered Cruz's ability to present her case, much less that it affected her substantial rights. Accordingly, we identify no abuse of discretion in the district court's refusal to grant Rule 60 relief on this ground.

3. Additional Challenges to the Judgment

Cruz raises several further challenges to the judgment that were not presented in her Rule 60(b) motion. Specifically, she challenges the district court's pretrial award of summary judgment for defendants on her disability claims and identifies purported errors in the district court's evidentiary rulings, conduct of trial, and jury charge. Because Cruz's notice of appeal references only the denial of her Rule 60(b)

motion, and not the underlying judgment, these new arguments are not properly before us. See New Phone Co. v. City of New York, 498 F.3d 127, 130-31 (2d Cir. 2007); see also Bowles v. Russell, 551 U.S. 205, 213 (2007). While "a notice of appeal from denial of a motion to reconsider, filed within ten days of the order or judgment sought to be considered, suffices to bring up for review the underlying order or judgment, at least where the motion renews arguments previously made," "R" Best Produce, Inc. v. DiSapio, 540 F.3d 115, 121 (2d Cir. 2008), that is not the procedural posture of this case.

Even if we could liberally construe Cruz's notice of appeal to reach challenges to the original judgment not raised in the Rule 60(b) motion, see Sahu v. Union Carbide Corp., 548 F.3d 59, 65-66 (2d Cir. 2008), we would not award her the relief sought. Cruz's disability claims were properly dismissed as unexhausted because she failed to raise them before the Equal Employment Opportunity Commission ("EEOC"), see McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007), and they were not "reasonably related" to her claim of age discrimination, Williams v. N.Y. City Hous. Auth., 458 F.3d 67, 70 (2d Cir. 2006) (internal quotation marks omitted). The other arguments Cruz raises were unpreserved in the district court and would warrant reversal only if we were to identify "fundamental error," which we do not. Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 795 (2d Cir. 2002) ("Fundamental error is more egregious than the 'plain' error that can excuse a procedural default in a criminal trial, and is so serious and flagrant that it goes to the very integrity of the [proceeding]." (internal quotation marks omitted)).

We have considered all of Cruz's remaining arguments on appeal and we conclude that they are without merit.[2]

---

[2] Cruz's March 16, 2 2010 motion to amend the notice of appeal, filed more than fourteen months after the denial of her Rule 60(b) motion and seventeen months after the district court's entry of judgment, is denied as untimely. See Fed. R. App. P. 4(a)(1)(A) (requiring that notice of appeal

Accordingly, the judgment and order of the district court are AFFIRMED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

---

be filed "with the district clerk within 30 days after the judgment or order appealed from is entered"). We likewise deny Cruz's motion to expand the record because Cruz has not demonstrated "extraordinary circumstances" warranting this court's consideration of material not presented to the trier of fact. See International Bus. Machs. Corp. v. Edelstein, 526 F.2d 37, 45 (2d Cir. 1975).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of July, two thousand ten.

JOSEFINA CRUZ,

Plaintiff-Appellant,

DIANA HRISINKO, ANDREA SHAPIRO, DIANA LEE FRIEDLINE, ISMAEL DIAZ, ANTHONY FERRARO, ELAINE JACKSON, MIDGE MARONI, DAVID MCMULLEN, RAM NARINE, GERALDINE WHITTINGTON, GLORIA CHAVEZ, FITZROY KINGTON, ERICA WEINGAST,

Plaintiffs,

v. No. 09-0942-cv

NEW YORK CITY DEPARTMENT OF EDUCATION, GRAPHIC COMMUNICATION ARTS HIGH SCHOOL, JEROD RESNICK, DOMINIC CIPOLLONE, EDWARD DEMEO, JACQUELINE KENNEDY ONASSIS HIGH SCHOOL, M.S. 219, ERIC BRAND, JUDITH SILVERMAN,

Defendants-Appellees.

Appendix B

Josefina Cruz having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

s/Cathedrine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREA SHAPIRO, et al.,	:	
Plaintiffs,	:	06 Civ. 1836 (JSR)
	:	
-v-	:	MEMORANDUM
	:	ORDER
NEW YORK CITY DEPART-MENT OF EDUCATION, et al.,	:	
Defendants.	:	

JED S. RAKOFF, U.S.D.J.

This is an age and disability discrimination case brought by twelve current and former teachers at the Graphics Communications Arts High School ("GCA") against the New York City Department of Education (otherwise known as the New York City Board of Education, or "BOE"), GCA Principal Jerod Resnick, and GCA Assistant Principals Judith Silverman and Eric Brand. On September 17, 2007, on consent of the parties, the Court dismissed all claims against defendants Silverman and Brand, with prejudice.

Plaintiffs' Third Amended Complaint ("Complaint") alleged, first, that defendant BOE violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., by discriminating against plaintiffs on account of age and by retaliating against them because they complained about such discrimination; second, that all defendants violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution, as made actionable here pursuant to 42 U.S.C. §

Appendix C

1983, by altering the terms, conditions and privileges of plaintiffs' employment in a manner different from how it treated similarly-situated employees younger than plaintiffs; third, that all defendants violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 and 29 U.S.C. § 621, by discriminating against plaintiff Josephina Cruz because of her disability and by retaliating against her; and, fourth, that all defendants violated the Due Process clause of the Fourteenth Amendment of the United States Constitution, made actionable here pursuant to 42 U.S.C. § 1983, by placing negative reports in plaintiffs' personnel files without giving them notice or an opportunity to be heard. Complaint ¶¶ 27-34.

Following discovery, defendants moved for summary judgment in their favor on all remaining claims by all remaining plaintiffs. In their responsive papers, plaintiffs abandoned their Due Process claims, which are therefore dismissed with prejudice. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl. Mem.") at 1. Furthermore, at oral argument, the Court, for the reasons stated from the bench, see transcript 9/5/07 at 25, dismissed with prejudice all claims brought by plaintiff Andrea Shapiro and the disability discrimination claim brought by plaintiff Josephina Cruz. The remainder of the summary judgment motion, directed to the ADEA and § 1983 age discrimination claims against defendants BOE and Resnick, is addressed below.

The facts pertinent to this motion, either undisputed or, where disputed and supported by competent evidence, taken most favorably to plaintiffs, are as follows. During the 2004-2005 school year, five teachers were transferred from GCA and reassigned to another school. All were over age forty. See Affirmation of Helen G. Ullrich dated Aug. 17, 2007 ("Ullrich Aff."), Exhibit 3. In June 2005, sixteen teachers at GCA were given unsatisfactory ratings ("U ratings") for the year. Of the 16, thirteen were over the age of 40. A year later, in June 2006, eight teachers received U ratings, only one of whom was under age forty. Ullrich Aff., Exhibit 2.

One of the teachers given a U rating in 2005 was plaintiff Diana Friedline, who was 53 years old at the time. Friedline has a New York State teaching license in commercial art and a New York City teaching license in cold type composition. She has been a full time teacher since 1989. In the Spring of 2005, Friedline applied for a curriculum writing position at GCA. Defendant Resnick told Friedline that Friedline was not eligible for the position because she was certified with the wrong license. Id., Exhibit 24 at 26-27, 80-81. Friedline filed a grievance objecting to her non-selection for the position, which was denied. Def. 56.1 ¶ 51; Pl. 56.1 ¶ 51. Friedline also applied to have a substitute vocational assistant student teacher placed in her classroom; but this application was also denied. Id., Exhibit 12 at ¶¶ 7-9. When Friedline complained to Resnick that these actions were prompted by age discrimination, he told her that he preferred to hire younger candidates. Id. ¶ 11. In June 2005, Friedline was giving a U rating for the year.

One of the teachers given a U rating in both years was plaintiff Josefina Cruz, who was 58 years old in June 2005. She has been a teacher of Spanish at GCA since 2003. In the Spring of 2005, she received 24 classroom visits in a two-month period, which she testified was well above the norm. Id., Exhibit 25 at 117; Exhibit 13 ¶ 11. Her schedule was changed seven times in two weeks. Id., Exhibit 25 at 124. She was then given a U rating for the year. Id., Exhibit 13 ¶ 12. In January, 2006, Cruz failed to administer the oral portion of the Spanish regents exam because she had not been given exam materials, which were kept in a vault to which she had no access. Id., Exhibit 25 at 49-50, Exhibit 13 ¶¶ 19-20. She was then given a U rating for the 2005 year, served with disciplinary charges, and reassigned to the Manhattan Regional Operation Center. Id., Exhibit 32 at 57-58, 97.

Another teacher who was given a U rating in 2005 was plaintiff Anthony Ferraro, who was then 72 years old. He began teaching at GCA in 1985. In May, 2003, defendant Resnick requested that teachers planning to retire contact him to let him know of their plans. Ferraro contacted Resnick but then changed his mind and decided not to retire. When

Ferraro told Resnick of his change in plans, Resnick asked Ferraro's age and then expressed "extreme dismay" that Ferraro was planning to say on at the school. Id., Exhibit 26 at 81-82; Exhibit 14 ¶ 3. In December, 2004, Assistant Principal Johnson (not a defendant) repeatedly chided Ferraro for continuing to work and reminded Ferraro that Ferraro could be doing other things with his life, such as spending time with his wife and traveling. Similarly, Assistant Principal Seyfried (also not a defendant) told Ferrarro that he did not understand why Ferraro was still working and that Ferraro should have retired long ago. Id., Exhibit 14 ¶ 5. In June, 2003, Resnick told Ferraro that Ferraro was doing a "deplorable job" coordinating the "LEARN" program, a work-study program through which Ferraro coordinated employment opportunities for GCA students in their chosen fields of study. Resnick also told Ferraro that his teaching style was "outmoded" and "outdated." Id., Exhibit 14 ¶ 6, Exhibit 26 at 98, 101. In September, 2003, Ferraro was removed from his position as LEARN coordinator, but a year later he was reassigned to the position but given less time to perform the necessary work. Id., Exhibit 26 at 110-112. In January 2005, Ferraro was removed from the position once again and replaced by a younger teacher who was not properly licensed to act as coordinator. Id., Exhibit 26 at 7, 44; Exhibit 14 ¶ 10. Also, in September 2004, Ferraro, a licensed peer mentor, applied to serve as a mentor to new teachers, but the position was given to someone 20 years his junior who was not a certified mentor. Id., Exhibit 14 ¶¶ 11-13. Finally, on June 13, 2005, Resnick told Ferraro his teaching style was "antiquated" and then days later, Ferraro received a U rating for the year. Id. ¶¶ 14-15.

Another plaintiff is Diana Hrisinko, who is currently 64 years old. She began teaching at GCA in 2002. Beginning in the fall of 2004, Resnick would come into her classroom unannounced, sometimes as often as five times per week. Id., Exhibit 27 at 31-45. On February 1, 2005, Hrisinko was transferred from GCA and thereafter worked briefly as a substitute teacher before assuming a position at another school. Def. 56.1 ¶ 39; Pl. 56.1 ¶ 39;

Ullrich Aff., Exhibit 27 at 28, 94. She filed a grievance claiming that her transfer was illegal because younger teachers with less seniority remained in their positions at GCA. Id., Exhibit 7.

Plaintiff Elaine Jackson is currently 69 years old and was the Assistant Principal for the English Department at GCA for one semester in the fall of 2003. During her one semester as Assistant Principal, Jackson increased the passing ratio of the English Regents exam. Id., Exhibit 16 ¶ 2. At no time did Resnick tell her that he was dissatisfied with her performance. Id. ¶ 4. Nonetheless, she was fired in January 2005 and replaced with a younger male who lacked relevant experience for the position. Id. ¶ 3.

Plaintiff Midge Maroni, currently 61 years old, began teaching at GCA in 2002. She testified that in early 2003 she was "subjected to ageist comments and unjust criticism" as "Resnick repeatedly made references to his desire to have a staff of young teachers." Id., Exhibit 17 ¶ 2; Exhibit 29 at 61. Resnick also said things such as "you don't take your profession seriously, you have old ideas." Id., Exhibit 29 at 57. Maroni was subjected to frequent short, unannounced visits to her classroom from Assistant Principal Brand.

Id., Exhibit 17 ¶¶ 3-5. During 2005, while Maroni was acting as advisor for the school newspaper, she complained to Resnick that her students lacked access to computers to produce the paper; the next year, a younger teacher received a computer to use for this purpose. Id., Exhibit 17 ¶ 7; Exhibit 29 at 132. In June, 2005, Maroni received a U rating for the year. Id., Exhibit 17 ¶ 9. The U was later dismissed in an arbitration proceeding. Id. ¶ 10.

Plaintiff Geraldine F. Whittington, currently 61 years old, began teaching at GCA in 1986. She has a state teaching license in Graphic Arts. Whittington testified that, beginning in 2004, Resnick criticized her for taking sick time to which she was entitled, threatened her with a U rating, id., Exhibit 30 at 39-43, and treated her with hostility, refusing to address her or make eye contact. Id., Exhibit 18 ¶ 4. When Resnick visited her classroom, he glared at her in an obtrusive and hostile manner. Id., Exhibit 30 at 57. In the spring of 2004, the computers and scanners

in Whittington's classroom broke. Whittington heard that new computer equipment was given to younger teachers rather than to her (despite her seniority). Id. at 86, 89. Whittington retired effective July 1, 2004. Def. 56.1 ¶ 15; Pl. 56.1 ¶ 15.

Plaintiff Fitzroy Kington, currently 58 years old, began teaching at GCA in 1992. During 2004-2005, Resnick repeatedly stood outside of Kington's classroom and shook his head disapprovingly. Ullrich Aff., Exhibit 31 at 42-43. Assistant Principal Guttman (not a defendant) told Kington that Resnick wanted younger, more energetic teachers on staff, and asked when Kington was leaving (even though Kington had not indicated that he had any plan to leave the school). Id. at 46, 48. During a social studies exhibition, Kington heard Resnick refer to "old, burnt out, tired teachers" who gave children detention and told them they were no good. Id. at 66. In May 2005, Kington applied to transfer to another school. Def. 56.1 ¶ 23; Pl. 56.1 ¶ 23.

Plaintiff Gloria Chavez, currently 59 years old, began teaching at GCA in 2002. During the 2004-2005 school year, Resnick began a pattern of yelling at Chavez and threatening disciplinary action against her. Ullrich Aff., Exhibit 20 ¶ 2. He also told her that she looked "tired," should start drinking caffeinated coffee, id. ¶ 3, and should modernize her teaching style. Id., Exhibit 32 at 103. In 2006, Chavez did not administer the oral portion of the Spanish regents exam because she was never given the required materials by Assistant Principal Silverman (no longer a defendant). Id., Exhibit 32 at 73-76; Exhibit 20 ¶¶ 5-6. Chavez was then served with disciplinary charges, given a U rating, and reassigned to the Manhattan Regional Operation Center. Id., Exhibit 20 ¶¶ 7-10; Exhibit 32 at 94.

Plaintiff Erica Weingast, currently 60 years old, became GCA's bilingual coordinator in 2001. In 2003-2004, Weingast was removed from an after-school assignment teaching English, and the position was given to a teacher who was 30 years younger than Weingast. Id., Exhibit 21 ¶¶ 4-5. Between 2003 and 2005, Weingast was "subjected to a campaign of harassment which entailed unwarranted criticisms of her management of [the] bi-lingual studies program." Id. ¶ 6. In

June, 2004, Resnick began to scream at her in public and humiliate her at school. Id. ¶ 7. In June 2005, defendants told her to expect a U rating or resign; Weingast resigned. Id. ¶¶ 10-11.

Plaintiff Ismael Diaz, currently 64 years old, began teaching at GCA in 2003. During the fall of 2004, Silverman was "constantly" coming into Diaz's classroom, commenting on trivial matters and asking Diaz to attend to a bulletin board in the hallway. Id., Exhibit 34 at 29, 33. She also checked his lessons plans more than once a week. Id. at 34. In May 2004, Resnick and Silverman observed one of Diaz's lessons and rated it "unsatisfactory". Resnick refused to speak to Diaz when Diaz said "Good Morning" in the halls. Id. at 74, 76. Diaz was given a U rating at the end of the 2004-2005 school year and decided to retire. Def. 56.1 ¶ 16; Pl. 56.1 ¶ 16.

Against this background, the remaining defendants (that is, Resnick and the BOE) seek summary judgment on each of the remaining plaintiffs' claims on a variety of grounds:

First, defendants seek dismissal of all the age discrimination claims brought pursuant to § 1983 on the ground that these claims are preempted by the ADEA. See Zombro v. Baltimore City Police Dep't, 868 F.2d 1364, 1366-67 (4th Cir. 1989) (availability of the ADEA's detailed procedures forecloses age discrimination claim brought under § 1983 because a plaintiff may not "cavalierly bypass the comprehensive process fashioned by Congress in the ADEA"); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Lafleur v. Tex. Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997). The argument is not without some force and may yet prevail in the Supreme Court. However, although the Second Circuit has not yet decided the precise issue, "the weight of authority in the Second Circuit favors the position that the ADEA does not preempt claims under § 1983 for age discrimination." Donlon v. Bd. of Educ., No. 06-CV-6027T, 2007 WL 4553932, at *3 n.1 (W.D.N.Y. Dec. 20, 2007); see also Stampfel v. City of New York, No. 04 Civ. 5036, 2005 WL 3543696, at *3 (S.D.N.Y. Dec. 27, 2005); Henneberger v. County of Nassau, 465 F.Supp.2d 176, 196 n.10 (E.D.N.Y. 2006). This is because the Second

Circuit, in Saulpaugh v. Monroe Cmty. Hosp., 4 F.3d 134, 143-144 (2d Cir. 1993), held that Title VII, 42 U.S.C. § 2000e et seq., did not preempt a §1983 claim for gender discrimination in violation of the Equal Protection clause of the Constitution. The Court explained that while a "[a] plaintiff cannot use Section 1983 to gain perceived advantages not available to a Title VII claimant, . . . a plaintiff can assert a claim under Section 1983 if some law other than Title VII [such as the Equal Protection Clause] is the source of the right alleged to have been denied." Id. at 143. Courts in this Circuit that have found that the ADEA does not preempt an age discrimination claim under § 1983 have found that there is no reason to distinguish between the ADEA and Title VII in this respect. See, e.g., Purdy v. Town of Greenburgh, 166 F. Supp. 2d 850, 867-68 (S.D.N.Y. 2001); Jungels v. State Univ. Coll., 922 F. Supp. 779, 785 (W.D.N.Y. 1996). This Court agrees that, given the reasoning of Saulpaugh, the effective law in the Second Circuit is that the ADEA does not preempt a § 1983 claim for age discrimination in violation of the Equal Protection clause.

However, to establish a § 1983 claim against a municipal instrumentality, here, the BOE, a plaintiff must show that the official or officials who deprived him or her of a constitutional right acted pursuant to an official municipal policy or custom. Monell v . Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). Where, as here, a plaintiff does not claim that the actions complained of were taken pursuant to a formally ratified policy but instead asserts that they were taken by an official whose actions represent official municipal policy, the Court must determine whether the official had final policymaking authority in the specific area at issue. Jeffes v. Barnes, 208 F.3d 49, 57 (2d Cir. 2000) ("[o]nly . . . officials who have final policymaking authority may by their actions subject the government to § 1983 liability") (internal quotations and citation omitted). Morever "whether a particular official has final policymaking authority is a question of state law." Jett v. Dallas Indep. Sch. Dist, 491 U.S. 701, 737 (1989); see also Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 108-09 (2d Cir. 2006).

In this case, plaintiffs argue that "Principal Resnick was the decision maker on all significant matters affecting plaintiffs' employment" and was thus the final policymaker under state law. See Pl. Mem. at 38. However, under New York law, New York City school principals do not have final policy making authority over employment decision concerning teachers in their schools. See McDonald v. Bd. of Educ., No. 01 Civ. 1991, 2003 WL 21782685, at *4 (S.D.N.Y. July 31, 2003) (holding that even superintendent was not final policymaking authority for purposes of employment decisions concerning teachers in his district); Hill v. N.Y. City Bd. of Educ., 808 F. Supp. 141, 151 (E.D.N.Y. 1992) (holding that, where Board of Education and Chancellor "retained the authority to overrule [Director of the Office of Pupil Transportation] on appeal" of his decision to fire employees, director did not have final policymaking authority). Therefore, plaintiffs' age discrimination claims against the BOE that are brought pursuant to § 1983 and the Fourteenth Amendment must be, and hereby are, dismissed.

Second, defendants argue that the ADEA claims of certain of the plaintiffs must be dismissed on procedural grounds:

To begin with, defendants argue that Ferraro's ADEA claim is time-barred because he failed to file his complaint within 90 days of receiving a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). See 29 U.S.C. § 626(e); Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886 (2d Cir. 1995); Solomon-Lufti v. N.Y. City Dep't of Educ., No. 05 CV 7260, 2006 WL 2664218, at *3 (S.D.N.Y. Sept. 13, 2006). Plaintiffs concede this point, see transcript 9/5/07 at 29, and Ferraro's ADEA claim is therefore dismissed.

Similarly, defendants argue, and plaintiffs concede, that Jackson's ADEA claim must be dismissed as time barred, because under the statute any claim accruing more than 300 days before a discrimination charge is filed with the EEOC is time barred. See transcript 9/5/07 at 38-39; Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002); Hodge v. N.Y. Coll. of Podiatric Med., 157 F.3d 164 (2d Cir. 1998).

Jackson's ADEA claim is therefore dismissed.

Whittington's ADEA claim is likewise dismissed, because she filed a charge of discrimination with the State Division of Human Rights ("SDHR") and the EEOC on June 18, 2005, but she retired from GCA effective 352 days prior to that date, to wit, on July 1, 2004.

Lastly, defendants argue that Weingast's ADEA claim must be dismissed because it was never presented to the EEOC. See 29 U.S.C. § 626(d); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 753-54 (1979); Flaherty v. Metromail Corp., 235 F.3d 133, 136 n.1 (2d Cir. 2000). However, under the so-called "piggybacking rule," "where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims aris[e] out of similar discriminatory treatment in the same time frame." Holowecki v. Fed. Exp. Corp., 440 F.3d 558, 564 (2d Cir. 2006) (internal quotations and citation omitted). Although it is true that "when the allegedly discriminatory activity affects a large group, piggybacking is not allowed unless the filed charge provides some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim," id., in this case the United Federation of Teachers brought an EEOC charge against the BOE, alleging violations of the ADEA, on behalf of all of its members over age 40. See Ullrich Aff., Exhibit 1 ¶¶ 1-3. The charge clearly provides some indication that the grievance affects a group of individuals defined broadly enough to include Weingast. Therefore, defendants' motion for summary judgment dismissing Weingast's ADEA claim is denied. [1]

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[1] Defendants originally argued that Whittington and Hrisinko's remaining § 1983 claims were barred by issue preclusion, because they previously filed administrative charges of discrimination with the SDHR, which issued a "no probable cause" determination. However, defendants conceded at oral argument that the SDHR determination had no preclusive effect, at least in Hrisinko's case, because Hriskinko was not represented by counsel during that proceeding. See transcript 9/5/07 at 33. Therefore, the motion for summary judgment on Hrisinko's remaining § 1983 claim is

Third, some, but not all, of the remaining claims must be dismissed on the merits. In order to establish a prima facie case of age discrimination under either the ADEA or § 1983, a plaintiff must [2] show that (1) he was a member of the protected class, i.e. an employee over 40 years of age; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the circumstances surrounding the action give rise to an inference of age discrimination. Abdu-Brisson v. Delta Air Lines, 239 F.3d 456, 466-67 (2d Cir. 2001). The burden to establish a prima facie case is "neither onerous, nor intended to be rigid, mechanized, or ritualistic." Id. at 467 (internal citations and quotation marks omitted).

If plaintiff makes out a prima facie case, a presumption of discrimination arises and the burden then shifts to the employer to provide evidence of a legitimate, non-discriminatory reasons for the adverse employment action. Spence v. Md. Cas. Co., 995 F.2d 1147, 1155 (2d Cir. 1993). Once the employer has adduced such evidence, the presumption of discrimination vanishes. Id. On a motion for summary judgment, the question then becomes "simply whether the evidence in plaintiff's favor, when viewed in the light most favorable to the plaintiff, is sufficient to sustain a reasonable finding that [the adverse action] was motivated at least in part by age discrimination." Tomassi v. Insignia Fin. Group, 478 F.3d 111, 115 (2d Cir. 2007).

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denied. See Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 734-36 (2d Cir. 2001). As to Whittington, the record is unclear as to when she was and was not represented by counsel. However, the Court finds that deciding whether her remaining § 1983 claim is barred by issue preclusion is unnecessary because she has failed to establish a prima facie case of age discrimination. See infra.

[2] An equal protection claim for age discrimination pursuant 2 to § 1983 is analyzed under the same standards as a claim made pursuant to the ADEA. See Sorlucco v. N.Y. City Police Dep't, 888 F.2d 4, 7 (2d Cir. 1989) (holding that McDonnell Douglas burden-shifting analysis applies to a § 1983 claim); Stampfel, 2005 WL 3543696, at *3-4.

Here, defendants argue that summary judgment must be granted because plaintiffs cannot establish the third or fourth prongs of their prima facie case: that they suffered adverse employment actions and that the circumstances surrounding any such actions give rise to an inference of age discrimination. They also argue that, even if plaintiffs have met their prima facie burden, defendants have articulated legitimate, non-discriminatory reasons for certain of the adverse actions and that, in these instances, the plaintiffs have failed to adduce sufficient evidence to enable a reasonable factfinder to find that these adverse actions were motivated, at least in part, by age discrimination.

Regarding the requirement of an adverse employment action, "it is well-established in this Circuit[] that a plaintiff need not suffer a change of job title, a decline in income, or a reduction of benefits in order to establish an adverse job action." Curran v. All Waste Sys., Inc., No. 99-9250, 2000 WL 639999, at *3 (2d Cir. May 16, 2000) (internal quotations and citation omitted). Instead, a plaintiff suffers an adverse employment action if he or she undergoes a "materially adverse change" in the terms and conditions of employment. Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). To be "materially adverse," however, a change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." Id. (internal quotations and citation omitted). Instead, a materially adverse change must be of the order of "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or [the like]." Id. (internal quotations and citation omitted).

Here, several of the remaining plaintiffs allege that the following adverse actions were common to two or more of them: U ratings; adverse transfer to the Manhattan Regional Operation Center; and constructive discharge. In addition, certain plaintiffs allege[3] other adverse actions particular to their individual

[3] In their opposition brief, plaintiffs state in passing that plaintiffs were

situations, as discussed infra.

With respect to the U ratings, those plaintiffs who received end-of-year U ratings have created a genuine issue of material fact as to whether such a rating constitutes an adverse employment action. Plaintiffs have adduced evidence that the consequences of a U rating include: (a) being removed from "per session" (i.e. extracurricular) paid positions; (b) being barred from applying for per session positions for five years; (c) inability to work in summer school; (d) lost income, including inability to move up a salary step; (e) reduced pension benefits; (f) inability to transfer within the school district; and (g) damaged professional reputations and stymied careers. See Ullrich Aff., Exhibit 12 ¶ 14; Exhibit 17 ¶ 11; Exhibit 21 ¶¶ 10, 12; Exhibit 35 at 40, 68-69, 239-240. This is considerably more than the alleged adverse consequences that were asserted in those cases -- which are not binding on this Court in any event --where district courts have found that a U rating did not suffice to defeat summary judgment. See Carmellino v. Dist. 20 of N.Y. City Dept. of Educ., No. 03 Civ. 5942, 2006 WL 2583019, at *28

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also "subject to a hostile work environment." Pl. Mem. at 31. But this is nowhere alleged, even inferentially, in what is, after all, plaintiffs' Third Amended Complaint. Such a claim may not now be raised in such belated fashion, long after discovery was completed, for it would hugely prejudice defendants. Therefore, any supposed claims of hostile work environment are hereby dismissed as untimely. Moreover, even if one were to reach the merits, "[a]n actionable discrimination claim based on hostile work environment under the ADEA is one for which the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment." Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 240 (2d Cir. 2007). "The conduct must be intimidating, hostile, or offensive, with discriminatory intimidation, ridicule, and insult permeating the workplace." Pozo v. J & J Hotel Co., L.L.C., No. 06 Civ. 2004, 2007 WL 1376403, at *15 (S.D.N.Y. May 10, 2007) (internal citations omitted) (Title VII). As more fully detailed infra, no plaintiff here has adduced sufficient competent, admissible evidence that would allow any reasonable juror to find that he or she was subjected to a hostile work environment.

(S.D.N.Y. Sept. 6, 2006); Castro v. N.Y. City Bd. of Educ. Pers. Dir., No. 96 Civ. 6314, 1998 WL 108004 (S.D.N.Y. Mar. 12, 1998).

With respect to the transfers to the Manhattan Regional Operation Center, while a transfer from one school to another would not ordinarily be an adverse action, here, plaintiffs have adduced enough evidence to create a triable issue of fact as to whether the transfers to the Manhattan Regional Operation Center were adverse employment actions comparable to demotions. See Switzer Decl., Exhibit DD. To begin with, the Regional Operation Center is not a school. Moreover, the transfers were all made while disciplinary charges were pending against the transferred teachers and therefore could, and allegedly were, perceived as punishment, not just by the plaintiffs but by their peers. Furthermore, plaintiffs have introduced evidence that, even if they were cleared of the disciplinary charges, assignment to the Manhattan Regional Operation Center remained a blight on their careers. Ullrich Aff., Exhibit 20 ¶ 11. A reasonable juror could therefore find that although the filing of disciplinary charges may not in and of itself constitute an adverse employment action, being transferred during the pendency of the disciplinary charges to a very different job at a very distant location was, and was reasonably perceived, as a demotion that would constitute a serious professional setback in a teacher's career. See Rodriguez v. Board of Educ., 620 F.2d 362, 365-66 (2d Cir. 1980) (plaintiff's transfer from junior high school art teacher to elementary school art teacher was adverse employment action where plaintiff introduced evidence that the two jobs were profoundly different and the transfer was "in effect, a demotion that would constitute a serious professional setback and stigma to her career"); Hills v. City of New York, No. 03 Civ. 4265, 2005 WL 591130, at *4 (S.D.N.Y. Mar. 15, 2005) (plaintiff's transfer to a rotating shift was adverse employment action where plaintiff presented evidence that, as a result of the transfer, she lost a schedule that was helpful in taking care of her grandchildren, lost the opportunity to collect "nighttime differential . . . pay," and suffered a loss of prestige).

With respect to constructive discharge, however, plaintiffs here failed to carry their burden. It is true that a genuine constructive discharge, whereby an employee's resignation is treated as if the employer had actually discharged the employee, Pena v. Brattleboro Retreat, 702 F.2d 322, 325-26 (2d Cir. 1983), constitutes an adverse employment action. But such a constructive discharge occurs when an employer "deliberately makes an employee's working conditions so intolerable that the employee is forced into an voluntary resignation." Spence, 995 F.2d at 1156 (internal quotations and citation omitted). Constructive discharge cannot be shown if the employee merely "disagreed with the employer's criticisms of the quality of his work, or did not receive a raise, or preferred not to continue working for that employer. Nor is the test merely whether the employee's working conditions were difficult or unpleasant." Id. Instead, a plaintiff must present evidence such that a rational juror could find that the employer deliberately created working conditions that were "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Pena, 702 F.2d at 325 (internal quotations and citations omitted); see also Spence, 995 F.2d at 1149-1158. Here, as detailed infra, no plaintiff has adduced sufficient competent, admissible evidence that would allow a reasonable juror to infer that he or she had been constructively discharged.

Turning from adverse actions to the fourth prong of the prima facie case, i.e., circumstances giving rise to an inference of discrimination, "[w]hile it is true that the stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination, we have held that when other indicia of discrimination are properly presented, the remarks can no longer be deemed stray and the jury has a right to conclude that they bear a more ominous significance." Abdu-Brisson, 239 F.3d at 468 (internal quotations and citation omitted). "The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory

behavior, the more probative that remark will be." Tomassi, 478 F.3d at 115. Direct remarks made by a supervisor are generally held to create an inference of discrimination sufficient to avoid summary judgment. See, e.g., Rose v. N.Y. City Bd. of Educ., 257 F.3d 156, 161-62 (2d Cir. 2001) (school superintendent's remarks that he would replace school principal with someone "younger and cheaper" were direct evidence of discriminatory animus because the comments were made directly to the plaintiff on more than one occasion by her direct supervisor, who had "enormous influence in the decision-making process"). In this case, plaintiffs have collectively introduced more than sufficient evidence to create an inference of discrimination, thereby satisfying the fourth prong of each of their prima facie cases of discrimination. Among other things, plaintiffs here adduced evidence that: (a) of the sixteen GCA teachers who were given U ratings for 2004-2005, only three were under age forty; (b) of the eight teachers to receive U ratings for 2005-2006, only one was under age forty; (c) all of the teachers transferred from GCA during the 2004-2005 school year were over age forty; (d) Resnick denied Shapiro's request for permission to take her students on a class trip to the theater but granted permission to a younger teacher; (e) when Friedline complained to Resnick that requiring a New York City Commercial Art license for various per session assignments amounted to age discrimination, he told her that he preferred to hire younger candidates; (f) when Ferraro told Resnick that he did not plan to retire, Resnick asked Ferraro's age and expressed "extreme dismay" that Ferraro was planning to remain at GCA; (g) Assistant Principal Johnson chided Ferraro for continuing to work and reminded him that he could be doing other things with his life, like spending time with his wife and traveling, while Assistant Principle Seyfried told Ferrarro he should have retired long ago; (h) in January 2005, Ferraro was removed from the position of LEARN coordinator and replaced by a younger teacher who was not properly licensed to coordinate the program; (i) when Ferraro, a licensed peer mentor, applied

to serve as a mentor to new teachers, the position was given to someone 20 years his junior who was not a certified mentor; (j) Jackson was fired from her position as Assistant Principal and replaced with a younger male who lacked relevant experience for the position; (k) Resnick told Maroni that she had "old ideas"; (l) while Maroni did not receive a computer with which to produce the school newspaper, the next year a younger teacher received a computer for this purpose; (m) when the computers and scanners in Whittington's classroom broke, she heard that new computer equipment was given to younger teachers; (n) Assistant Principal Guttman told Kington that Resnick wanted younger, more energetic teachers on staff, and asked when Kington was leaving; (o) during a social studies exhibition, Kington heard Resnick refer to "old, burnt out, tired teachers" who gave children detention and told them they were no good; (p) Resnick told Chavez she looked "tired", should start drinking caffeinated coffee, and should modernize her teaching style; and (q) Weingast was removed from an after-school assignment teaching English and the position was given to a teacher 30 years younger.

In short, all remaining plaintiffs who suffered U ratings or transfer to the Manhattan Regional Operation Center have made out a prima facie case of ADEA and § 1983 age discrimination on the merits. The Court turns, then, to certain more individual adverse actions alleged by particular plaintiffs, as well as to defendants' arguments that, even where a given plaintiff has made out a prima facie case, defendants have in some instances adduced evidence of legitimate, non-discriminatory reasons for the adverse actions and that in such instances plaintiffs have not shown that such reasons were pretextual or that, in any event, there is sufficient evidence to warrant a reasonable juror in finding that the adverse action was motivated, at least in part, by age discrimination.

Plaintiff Friedline complains of two adverse actions, that she was wrongfully rejected for an open curriculum writing position for which she applied in the Spring of 2005 and that she received a U rating for the 2004-2005 school year. As to the

former, defendants do not challenge that such a rejection can be an adverse action, but they have introduced evidence that Friedline was not selected for the open curriculum writing position because she held a New York City teaching license in Cold Type Composition, rather than the required City license in Commercial Arts, and because other candidates had more recent industry experience. See Switzer Decl., Exhibit HH. However, Friedline has responded with evidence that defendants have sought only to select and promote employees with newer teaching licenses (Commercial Art rather than Cold Type Composition), and that this adversely affects older employees, because only individuals over age 40 are likely to possess a Cold Type License, which has since been subsumed into the Commercial Art license. Ullrich Aff., Exhibit 24 at 26-27, 80-81, 155; Exhibit 12 ¶¶ 2-5. In addition, Friedline has introduced evidence that she had previously been selected to rewrite the entire commercial art program and to rework the curriculum for commercial art, offset printing, and commercial photography. Id., Exhibit 24 at 76. Yet, under Resnick, Friedline was allegedly rejected from a number of positions because of her Cold Type license, despite her qualifications. Id., Exhibit 12 ¶¶ 6-9. This is sufficient to sustain a reasonable finding that Friedline was qualified for the open curriculum writing position and that the decision not to select her for the position was motivated, at least in part, by age discrimination.

As to the U rating, defendants present evidence that Friedline was given the rating because of allegations that she failed to deposit proceeds from a National Honors Society Valentine's Day Sale into the school account and because she published a program for the National Honor Society induction that was filled with typographical errors. See Switzer Decl., Exhibit JJ; Ullrich Aff., Exhibit 35 at 42-44. However, Friedline testified that the Valentine's Day sale issue was the result of a student misplacing some funds, and that it was eventually determined that Friedline had not stolen anything. Ullrich Aff., Exhibit 12 ¶¶ 15-17; Exhibit 24 at 13, 61-62. She also testified that, with regard to the National Honors Society

program and letter, Resnick gave her 70 names to add to the program and letter the night before the ceremony, Ullrich Aff., Exhibit 24 at 27-28, thus giving her inadequate time to amend, proofread, and obtain his approval. Combined with the evidence establishing an inference of discrimination, discussed supra, this is sufficient to sustain a reasonable finding that the decision to give Friedline a U rating was motivated, at least in part, by age discrimination.

Plaintiff Cruz complains of adverse actions in being given U ratings in June 2005 and June 2006 and in being transferred to the Regional Operation Center. Defendants have largely ignored the June 2005 U rating but have responded to the June 2006 U rating and the transfer by introducing evidence that all three Spanish teachers who failed to administer the oral portion of the Spanish Regents exam in January 2006, including a teacher who was 34 years old, were given U ratings for the year and transferred to the Manhattan Regional Operation Center. See Switzer Decl., Exhibit B at 57-58, 82; Exhibit CC. In response, however, Cruz has introduced evidence that she did not administer the oral portion of the exam because she was not given the necessary materials (which were kept in a vault) by Assistant Principal Silverman. Ullrich Aff., Exhibit 13 ¶¶ 18-22. Combined with the evidence establishing an inference of discrimination discussed supra, this is sufficient to sustain a reasonable finding that the decisions to give Cruz the U ratings and transfer her to the ROC were motivated, at least in part, by age discrimination.

Plaintiff Ferraro complains of adverse employment actions in being removed from the position of LEARN coordinator in January 2005, not being selected to serve as a mentor to new teachers in September 2004, and receiving a U rating for the year 2004-2005 school year. Defendants have not introduced any material evidence of legitimate, non-discriminatory reasons for any of these actions.

Plaintiff Hrisinko's only clearly stated complaint of an adverse action is her reassignment, not to the Manhattan Regional Operation Center, but to another school, and she has

failed to adduce any material evidence as to why this was adverse. To the extent she also seeks, belatedly, to raise a hostile work environment claim, she has failed to do so, even assuming (contrary to fact) that the claim is timely. Hrisinko's complaints to the effect that Resnick began coming into her classroom unannounced and looking around, sometimes as often as five times per week, are insufficient to create a genuine issue of material fact as to whether she suffered a materially adverse change in the terms and conditions of employment, nor is it a sufficient basis for a reasonable jury to find that Hrisinko's workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently pervasive to alter the conditions of her employment. Therefore, summary judgment is granted dismissing all remaining claims of plaintiff Hrisinko.

Plaintiff Jackson has introduced evidence that she suffered an adverse employment action because she was fired from her position as Assistant Principal. Defendants' have not sought to offer at this stage any legitimate, non-discriminatory reason for her firing.

Plaintiff Maroni complains of an adverse action because she received a U rating for the 2004-2005 school year. Although the rating was later dismissed in an arbitration proceeding, it is not clear from the record what effect, if any, the rating had on Maroni before it was dismissed, and defendants have introduced no evidence of a legitimate, non-discriminatory reason for this action. Consequently, the claim remains viable at this stage.

Plaintiff Whittington complains of many things, but none rises to the level of an adverse employment action, hostile work environment, or constructive discharge. Whittington's testimony that she was criticized for taking sick leave, threatened with a U rating, and treated with hostility by Resnick, who refused to address her or make eye contact and who glared at her "in an obtrusive and hostile manner," is insufficient to create a genuine issue of material fact as to whether she suffered a materially adverse change in the terms and conditions of her employment. In addition, Whittington's not receiving new computer equipment cannot rise to the level

of an adverse employment action as a matter of law. Furthermore, there is no evidence from which a reasonable juror could find that Whittington's resignation in 2004 could qualify as a constructive discharge. Lastly, even if (contrary to fact) any claim by Whittington of hostile work environment were timely, none of the foregoing allegations is sufficient for a reasonable juror to find that Whittington's workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently pervasive to alter the conditions of her employment. Therefore, summary judgment is granted dismissing Whittington's remaining claims.

Plaintiff Kington's claims are similar to Whittington's and fail for the same reasons. Kington's testimony that he began to feel pushed out of GCA, that Resnick repeatedly stood outside of his classroom and shook his head disapprovingly, and that Assistant Principal Guttman told Kington that Resnick wanted younger, more energetic teachers on staff does not rise to the level of an adverse employment action or a hostile work environment as a matter of law. In addition, Kington's application to transfer out of GCA cannot be considered a constructive discharge because there is no evidence from which a reasonable juror could find that Kington's working conditions were so difficult or unpleasant that a reasonable person in Kington's shoes would have felt compelled to transfer. Accordingly, Kington's remaining claims must be, and hereby are, dismissed.

Plaintiff Chavez's claims cannot be dismissed on summary judgment for the same reason that summary judgment was denied as to Cruz's claims, supra. Like Cruz, Chavez failed to administer the oral portion of the Spanish Regents exam and, as a result, was given a U rating for the 2005-2006 school year and reassigned to the Manhattan Regional Operation Center pending disciplinary charges; but, like Cruz, Chavez testified that she did not administer the exam because, despite her repeated requests, she was never given the necessary materials by Ms. Silverman. Ullrich Aff., Exhibit 32 at 73-76; Exhibit 20 ¶¶ 5-6. Accordingly, Chavez's claims remain viable.

Plaintiff Weingast has created a genuine issue of material fact as to whether she suffered an adverse employment action because she was removed from an after-school assignment teaching English and the position was given to a teacher 30 years younger. Defendants have not offered at this stage any legitimate, non-discriminatory reason for this action, and consequently the claim remains viable.

Plaintiff Diaz has created a genuine issue of material fact with regard to whether he suffered an adverse employment action because he received a U rating at the end of the 2004-2005 school year. Def. 56.1 ¶ 16; Pl. 56.1 ¶ 16. Defendants have not introduced at this stage any evidence of a legitimate, non-discriminatory reason for this action, and consequently the claim remains viable.

In addition to the discrimination claims, the Third Amended Complaint also makes allegations of retaliation. A prima facie case of retaliation requires a plaintiff to adduce evidence that "(1) the plaintiff was engaged in an activity protected under the ADEA; (2) the employer was aware of the plaintiff's participation in the protected activity; (3) the plaintiff was subject to an adverse employment action; and (4) there is a nexus between the protected activity and the adverse action taken." Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997). Although the Third Amended Complaint refers to plaintiffs' retaliation claims largely in conclusory fashion, the instant motion papers center on the claims of Diaz and Chavez. But Diaz cannot state a claim for retaliation because he did not engage in any protected activity before he suffered the adverse action of which he complains, i.e., the U rating at the end of the 2004-2005 school year. Instead, he did not complain of discrimination (the protected activity in issue) until March, 2006. See Switzer Decl., Exhibit F at 80-81, 83. The same is true for Chavez, who filed a complaint of discrimination only after she had left GCA. Ullrich Aff., Exhibit 32 at 102-103.[4]

[4] It would appear from the briefing papers that plaintiffs are not pursuing

For the foregoing reasons, the defendants' motion for summary judgment is granted in part and denied in part. Specifically, the following claims of the following plaintiffs remain to be tried premised on the following adverse actions:

Friedline § 1983 claim against Resnick and ADEA claim against BOE, both claims premised on Friedline's being denied an open curriculum writing position and/or being given a U rating.
Cruz § 1983 claim against Resnick and ADEA claim against BOE, both claims premised on Cruz's being given U ratings in 2005 and/or 2006, and/or her being transferred to the Regional Operation Center.
Ferraro § 1983 claim against Resnick, premised on Ferraro's being removed from his position as LEARN coordinator, receiving a U rating, and/or being denied a peer mentorship position.
Jackson § 1983 against Resnick, premised on Jackson's being fired as Assistant Principal.
Maroni § 1983 claim against Resnick and ADEA claim against BOE, both claims premised on Maroni's being given a U rating in 2005.
Chavez § 1983 claim against Resnick, and ADEA claim against BOE, both premised on Chavez's being given a U rating in 2006 and/or being transferred to the Regional Operation Center.
Weingast § 1983 against Resnick and ADEA claim against BOE, both premised on Weingast's being removed from an after-school assignment teaching English.
Diaz § 1983 claim against Resnick and ADEA claim against BOE, both premised on Diaz's being given a U rating in 2005.

All other claims are hereby dismissed with prejudice. Counsel for the two sides are instructed to jointly call Chambers at 2 p.m. on June 16, 2006 to schedule a prompt trial of the remaining claims.

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a claim for retaliation as to any other remaining plaintiff in this case. If this is not true, plaintiffs' counsel is hereby instructed to raise the issue during the joint conference call with Chambers, discussed infra.

SO ORDERED.

/s/ JED S. RAKOFF, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIANA FRIEDLINE, et al., Plaintiffs,	:	
	:	06 Civ. 1836 (JSR)
-v-	:	
	:	FINAL JUDGMENT
NEW YORK CITY DEPARTMENT OF EDUCATION and JEROD RESNICK, Defendants.	:	

JED S. RAKOFF, U.S.D.J.

After the Court had previously dismissed certain of the claims and certain of the plaintiffs, the remaining claims by the remaining plaintiffs went to trial, and on September 19, 2008, a jury returned a verdict finding (a) defendant New York City Department of Education (the "City defendant") and defendant Jerod Resnick jointly and severally liable to plaintiff Diana Friedline on Friedline's claim that she was denied an open curriculum writing position because of her age, (b) defendant Jerod Resnick liable to plaintiff Anthony Ferraro on Ferraro's claim that he was removed from his position as LEARN coordinator because of his age,[1] (c) the City defendant and defendant Jerod Resnick jointly and severally liable to

[1] The jury also found defendant Jerod Resnick liable to plaintiff Anthony Ferraro on Ferraro's claim that Ferraro received an unsatisfactory rating on his 2005 annual performance review because of his age; but this claim had already been dismissed by the Court at the close of all the evidence and was only submitted to the jury so that, if that ruling were reversed on appeal, no retrial of that claim would be necessary.

Appendix D

plaintiff Midge Maroni on Maroni's claim that she received an unsatisfactory rating on her 2005 annual performance review because of her age, and (d) no liability as to all other remaining plaintiffs and claims. As to (a), the jury awarded Ms. Friedline $8,000 in compensatory damages from the City defendant, which must be doubled because the jury found the City acted willfully, and $3,000 from defendant Resnick. As to (b), the jury awarded Mr. Ferraro $80,000 in compensatory damages from defendant Resnick; and as to (c) the jury awarded Ms. Maroni $27,000 in compensatory damages from the City defendant, which must be doubled because the jury found the City acted willfully, and $5,000 from defendant Resnick. Finally, after trial, plaintiff Maroni, by letter brief dated September 26, 2008 (which will be separately docketed), moved the Court to award her additional front pay, future pension benefits, and damages for continuing emotional injury, which motion the Court now denies, essentially for the reasons stated in the defendants' letter brief dated October 3, 2008 (which will be separately docketed).

Accordingly, the Court now enters final judgment, holding the City defendant liable to plaintiff Maroni in the amount of $54,000, and finding defendant Resnick liable to plaintiff Friedline in the amount of $3,000, liable to plaintiff Ferraro in the amount of $80,000, and liable to plaintiff Maroni in the amount of $5,000. Any party wishing to file a post-judgment motion must convene a conference call with adversary counsel and the Court by no later than October 24, 2008 to schedule the briefing of such motion.

SO ORDERED.

/s/ JED S. RAKOFF

Dated: New York, NY
October 14, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Diana Friedline et al,	:	
Plaintiffs	:	06 Civ. 1836 JSR)
vs	:	
	:	
New York City Department of Education et al,	:	
Defendants.	:	

PLAINTIFF JOSEFINA CRUZ NOTICE OF MOTION (i) FOR RECONSIDERATION PURSUANT TO LOCAL RULE 6.3, (ii) FOR RELIEF PURSUANT TO RULE 60 (b) (1), (2), (3) & (6) FROM PRIOR COURT ORDERS, (iii) FOR AMENDMENT OF PLEADINGS TO CONFORM TO THE EVIDENCE AND TO PERMIT PLAINTIFF'S CLAIMS TO BE RESTORED AND PROCEED FOR RESOLUTION TO THE JURY ON THE ISSUES OF LIABILITY AND DAMAGES CONSISTENT WITH 'ME CLAIMS SET FORTH IN THE COURT'S JUNE 13, 2008 ORDER, THE EVIDENCE ADDUCED AT TRIAL AND THE NEW EVIDENCE DISCOVERED AFTER THE TRIAL AND (iv) FOR SUCH OTHER AND FURTHER RELIEF AS IS JUST AND EQUITABLE

PLEASE TAKE NOTICE that Plaintiff Josefina Cruz will move this Honorable Court, as soon as counsel can be heard, before the Hon. Jed S. Rakoff USDJ, at the United States District Court for the Southern. District of New York, located at 500 Pearl Street, Courtroom 14 - B, New York., NY 10007, for, among other things,

Appendix E

1. Reconsideration, pursuant to Local Rule 6.3, of the Court's dismissal of Plaintiff s claims at trial:

2. Amendment of the Pleadings, pursuant to FRCP Rule 15 (b) to conform to the evidence and to permit the Plaintiff s claims to be restored and permitted to be sent to the jury for consideration on the issues of liability and damages;

3. Relief from the Court's prior dismissal of Plaintiff's claims pursuant to, among other things:
   a. FRCP Rule 60 (b) (1) - mistake;
   b. FRCP Rule 60 (b) (2) - newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
   c. FRCP Rule 60 (b) (3) - fraud, misrepresentation, or misconduct by an opposing party;
   d. FRCP Rule 60 (b) (4) - judgment is void;
   e. FRCP Rule 60 (b) (6) - fcbr other reasons that justify relief; and

4. For such other and further relief as the Court deems just and equitable.

PLEASE TAKE FURTHER NOTICE that in support of this Motion, Plaintiff Josefina Cruz shall rely upon the attached Declaration, with attachments, and Memorandum of Authorities.

PLEASE TAKE FURTHER NOTICE that opposition, if any, should be filed in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Southern District.

PLEASE TAKE FURTHER NOTICE that Plaintiff requests that the Court grant and direct the parties to appear for Oral Argument on this Motthat Plaintiff requests that the Court grant and direct the parties to appear for Oral Argument on this Motion pursuant to Local Rule ion pursuant to Local Rule 6.1 (c) pursuant to the Local Rules of the Sourthern District.

Dated: November 26, 2008
New York, NY

/s/_____
Josefina Cruz
301 Cathedral Parkway, Apt. 1-J
New York, NY 10026
Plaintiff *Pro* Se (212) 222-0371

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Diana Friedline et al,	:	
Plaintiffs	:	**06 Civ. 1836 JSR)**
vs	:	
	:	
New York City Department of Education et al,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF JOSEFINA CRUZ' NOVEMBER 26, 2008 NOTICE OF MOTION (i) FOR RECONSIDERATION PURSUANT TO LOCAL RULE 6.3, (ii) FOR RELIEF PURSUANT TO RULE 60 (b) (1), (2), (3), (4) & (6) FROM PRIOR COURT ORDERS, (iii) FOR AMENDMENT OF PLEADINGS TO CONFORM TO THE EVIDENCE AND TO PERMIT PLAINTIFF'S CLAIMS TO BE RESTORED AND PROCEED FOR RESOLUTION TO THE JURY ON TIIE ISSUES OF LIABILITY AND DAMAGES CONSISTENT WITH THE CLAIMS SET FORTH IN THE COURT'S JUNE 13, 2008 ORDER, THE EVIDENCE ADDUCED AT TRIAL AND THE NEW EVIDENCE DISCOVERED AFTER THE TRIAL AND (iv) FOR SUCH OTHER AND FURTHER RELIEF AS IS JUST AND EQUITABLE

Josefina Cruz
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Plaintiff Pro Se
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Appendix F

1) INTRODUCTION

I am one of the Plaintiffs in this matter. I am now a pro se litigant and I submit this brief Declaration to outline the reasons I believe the Court should reconsider its dismissal of my claims without allowing them to go to the jury.[1] This Motion is not an attempt to reargue issues that were properly before and ruled on by the Court or to take an impermissible "second bite at the apple". On the contrary, all I want or wanted was and is to have the claims from my complaint that Court said could be presented to and considered by the jury, as the Court indicated they could be in June 13, 2008 Opinion. And. I prayed the Court would allow my claim to go forward as it was perhaps one of the first claims where a NY jury could have received evidence and rule upon the issue of how transfers / reassignment to Rubber Rooms was or could be considered impermissible / actionable conduct for which Defendants could be held liable in damages. The Motion can and should be granted so that my claims (including those based on my updated Right to Sue Letter) can be expeditiously ruled upon and resolved.

1) SUMMARY OF RELEVANT FACTS

The facts are set forth in accompanying Brief Declaration of Josefina Cruz ("Cruz Deck") and the exhibits and documents referenced therein.

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[1] The Court should note that I am filing these papers as directed by the Court by November 26, 2008. However, the Motion is filed without the benefit of my having been able to have access to all trial transcripts, exhibits (included and excluded) and statements from excluded witnesses. It is my intention and I pray the Court give me the additional reasonable opportunity to supplement these papers to include specific additional references to Court documents.

2) AUTHORITY

a) Local Civil Rule 6.3. Motion for Reconsideration

The standard for granting a motion for reconsideration is strict and may be granted when the moving party can point to controlling decisions or data that the court overlooked, which matters might reasonably be expected to alter the conclusion reached by the court and the motion may be granted to 'correct a clear error or prevent manifest injustice. See Shrader v. CSX Tramp., Inc., 70 F. 3d 255 (2nd Cir. 1995) and Griffin Indus., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999).

For reconsideration, a movant must show that the Court has overlooked controlling decisions or factual matters that, had they been considered, might reasonably have altered the result. See Range Road Music, Inc. v. Music Sales Corp., 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000).

In this case, the Court either overlooked the facts related to the discrimination based on my age, or my disability or the harassment against me or the retaliation against me. One of the most important issues should have been to allow the jury to consider and render a verdict based on the evidence.

b) FRCP Rule 15 (b) Amendments During and After Trial.

FRCP Rule 15 (b) provides that in pertinent part that if an objection is raised at trial that the evidence should not be permitted because "the evidence is not within the issues raised in the pleadings" the court may permit the pleadings to be amended. In fact, such an amendment should be freely permit by the Court when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

In this case, the DOE objected to evidence being introduced and moved to dismiss my claim because the evidence was not included in and did not relate to my complaint. Instead of permitting an Amendment of my complaint in accordance with FRCP 15, the Court dismissed my complaint and refused to allow the issues to go to the jury.

The Court's action is precisely the type of mistake and/or error of law or fact that should be reversed.

c) FRCP Rule 60 (b) (1) - Mistake, Inadvertence or Excusable Neglect, FRCP 60 (b) (2) - New Evidence and FRCP Rule 60 (b) (3) - Fraud or Misrepresentation by Adverse Party

Relief from an error is normally sought pursuant to 60(b) (1) on the theory that such error constitutes mistake, inadvertence or excusable neglect, pursuant to Rule 60 (b) (2) discovery of relevant new evidence that was not previously available and Rule 60 (b) (3) fraud or misrepresentation by adverse party.

However such relief is not available for mistake or omission by reason of ignorance of the law or other rules of the court, or inability to efficiently manage his caseload." United States v. Ciranii, 535 F.2d 736, 739 (2d Cir. 1976); United States v. Erdoss, 440 F.2d 122.1 (2d Cir.), cert. denied sub nom. Horvath v. United States, 404 U.S. 849, 92 S.Ct. 83, 30 L.Ed.2d 88 (1971); Schwarz v. United States, 384 F.2d 833 (2d Cir. 1967). A mistake may be a basis for relief where the mistake was the result of fraud by another. See Cobalt Multi-Family Investors I v. Bridge Cap. (USVI) 06 Civ. 5738 (KMW)(MHD). - August 1.5, 2007, citing Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991) (citation omitted): Barclay Arms, Inc. v. Barclay Aims Assn, 74 N.Y.2d 644. - Page 24 - *646*, 542 N.Y.S.2d 512, 513-14 (1989). And to prevail on a

claim for mistake based on fraudulent inducement, a party must demonstrate (1) a false representation was made, (2) the adversary was aware of, or recklessly disregarded, its falsity, (3) the adversary acted with intent to mislead or to induce the other to act, and (4) there was detrimental reliance on the misrepresentation. E.g., Aetna Cas. & Surety Co. v. Aniero Concrete Co., 404 F.3d 566, 580 (2d Cvir. 2005) (citations omitted).

In this case, there was ample evidence to support my claims and the Court erred in not permitting the Amendment to the Complaint so that the evidence could be received and my claims sent to the jury.

(d) FRCP Rule 60 (b) (4) - Judgment is Void

A judgment is void under Rule 60(b)(4) of the Federal Rules of Civil Procedure "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." See Grace v Bank Leumi Trust Co. of NY, 443 F.3d 180, 190 (2nd Cir. 2006), Texlon Corp. v. Mfrs. Hanover Commercial Corp., 596 F.2d 1092, 1099 (2d Cir. 1979) (quoting 11 Wright & Miller, Federal Practice and Procedure, § 2862 at 198 (1973); and Fustok v. Conti-Commodity Servs.. Inc., 873 F.2d 38, 39 (2d Cir. 1989).

Rule 60(b)(4) involves a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction. See e.g., Kansas City Southern Ry. Co. v. Great Lakes Carbon, 624 F.2d 822, 825 (8th Cir. 1980); Marshall v. Board of Ed., Bergenfield, N.J., 575 F.2d 417, 422 (3rd Cir. 1978); Lubben v. Selective Service System Local Board No. 27, 453 F.2d 645, 649-50 (1st Cir. 1972); J. Moore & J. Lucas, supra. ¶ 60.25[2] at 227.

In this case, the Court's June 13, 2008 Order allowed certain of my claims to be presented. However, the Court's imposition of a two-hour time limitation on my testimony and other limitations on evidence suggest that my due process rights to have the jury consider the evidence and render a

verdict were violated and therefore I should be granted relief pursuant to FRCP Rule 60 (b) (4).

e) FRCP Rule 60 (b) (6) - Any Other Reason justifying Relief

A district court may grant relief from an otherwise final judgment for any of five enumerated reasons or for "any other reason justifying relief from the operation of the judgment." See Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950): Travelers Indemn. Co. v. Sarkisian, 794 F.2d 754 (2nd Cir. 1986); Loucke v. United States, 21 F.R.D. 305 (S.D.N.Y. 1957). However, Rule 60(b)(6) is appropriate only in "extraordinary circumstances," Ackermann v. United States, 340 U.S. 193, 199, 71 S.Ct. 209, 95 L.Ed. 207 (1950), See also Gonzalez v. Crosby, 545 U.S. 524. - Page 792 - 535. 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005).

The Court has authority to raise issues on its own motion when "the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. TDC Management Corp., 288 F.3d 421, 425 (D.C. Cir.2002) (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936). The catch-all provision, Rule 60(b)(6), is mutually exclusive with the grounds for relief in the other provisions of Rule 60(b), which include excusable neglect, newly discovered evidence, and fraud, all three of which require that the motion be brought within one year of the judgment from which relief is sought. See Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

Rule 60 (b) (6) relief is "properly invoked where there are extraordinary circumstances or where the judgment may work an extreme and undue hardship." DeWeerth v. Baldinger, 38 F.3d 1266 (2nd Cir 1994). Properly applied Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments, should be broadly

construed to do "substantial justice" and should only be invoked upon a showing of exceptional circumstances. See Nemaizer v. Baker, 793 F.2d 58 (2nd Cir. 1986); House v. Secretary of Health and Human Services, 688 F.2d 7, 9 (2d Cir. 1982); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981). Rule 60(b) relief is designed to afford parties an opportunity to resolve a dispute on its merits. 7 J. Moore & J. Lucas, Federal Practice, ¶ 60.19, at 156 (2cl ed. 1983). Rule 60 (b) (6) provides that relief may be granted for "any other reason justifying relief from the operation of the judgment" or when the judgment may work an extreme and undue hardship. See Matter of Emergency Beacon Corp., 666 F.2d 754, 759 (2d Cir. 1981), Id.; United States v. Karahalias, 205 F.2d 331, 333 (2d Cir. 1953). And, Rule 60 (b) (6) provides "a grand reservoir of equitable power" See United States v. Cirami, 563 F.2d 26 (2d Cir. 1977) (quoting 7 Moore's Federal Practice, ¶ 60.27[2] at 315 (2d ed. rev. 1975); accord Dunlop v. Pan American World Airways, 672 F.2d 1044, 1051 (2d Cir. 1982).

As noted above, and in the accompanying Cruz Declaration and in the Court's own June 13, 2008 Opinion and Order, this case was to and could have been a case where important constitutional, free speech and civil rights issues would have been heard by a jury. It was not. The case was to and could have been a case where a jury could have considered and rendered a verdict related to the discriminatory, retaliatory and harassing conduct against persons such as me, who are senior tenured teachers, who suffer from certain physical disabilities and who dared to speak out against the policies and practices of Defendant. It was not. And., the case was to and could have been a case where a jury could have considered and rendered a verdict based upon Defendants banishing me to the Rubber Room, where I was to sit and rot for years, without trial, without due process and in a hostile and dangerous environment. It was not.

Rule 60 (b) (6) provides the Court with the necessary authority pursuant to which the Court should reverse its prior Order, reinstate my claims and permit them to be presented to the jury.

4) CONCLUSION

In view of the foregoing, Plaintiffs pray the Court grant the relief sought in my Motion for Reconsideration, Motion to Amend the Complaint to Conform to the Evidence, Motion to Relieve Me of the Order Dismissing My Claims, Motion to Restore my individual claims and for such other relief as is just and equitable.

Dated: November 26, 2008
New York, NY

/.s/
Josefina Cruz
301 Cathedral Parkway, Apt. 1-J
New York, NY 10026
Plaintiff Pro Se
Tel. (212) 222-0371

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Diana Friedline et al,	:	
Plaintiffs	:	**06-cv-1836 (JSR)**
vs	:	
	:	
New York City Department of Education et al,	:	
Defendants	:	

Josefina Cruz, hereby declares and says:

Introduction

1) I am one of the Plaintiffs in this matter. I am now a pro se litigant and I submit this brief Declaration to outline the reasons I believe the Court should reconsider its dismissal of my claims without allowing them to go to the jury.[1]
2) I am not attempting to reargue issues that were properly before and ruled on by the Court or to take an impermissible "second bite at the apple". On the contrary, all I want or wanted was and is to have the claims from my complaint (See Exhibit 1) that Court said could be presented to and considered by the jury, as the

[1] The Court should note that I am filing these papers as directed by the Court by November 26, 2008. However, the Motion is filed without the benefit of my having been able to have access to all trial transcripts, exhibits (included and excluded) and statements from excluded witnesses. It is my intention and I pray the Court give me the additional reasonable opportunity to supplement these papers to include specific additional references to Court documents.

Appendix G

Court indicated they could be in June 13, 2008 Opinion and Order (See Exhibit 2). And, I had pray the Court would allow my claim to go forward as it was perhaps one of the first claims where a NY jury could have received evidence and rule upon the issue of how transfers / reassignment to Rubber Rooms was or could be considered impermissible / actionable conduct for which Defendants could be held liable in damages.

3) I have obtained a new Right to Sue letter dated Nov. 18, 2008 (See Exhibit 3) and all my claims are included.

Factual & Legal Basis for Reconsideration

4) During the trial, in response to a DOE Motion, several mistakes of evidence, fact and law were made that resulted in my not being permitted to introduce certain evidence, my not being able to call certain witnesses, or the Court's not properly evaluating the evidence or refusing to consider the evidence or the law of the case and "dismissed" the portions of my claims - that in its June 13, 2008 Decision and Order were allowed claims.
5) During the trial the Court may have been confused with the different plaintiff individual cases or the Court may have had time limitations that interfered with its ability to give me the time necessary to fully consider the evidence presented in relation to my case or to take the general evidence that was presented and apply them to the facts of my case.
6) Also, there was confusion as a result of the limitations the Court placed on testimony and evidence and these facts led to Court's making mistakes of fact, law as applied to my claims, or the law of the case that permitted me to prosecute the claims related to the different types of discriminatory and retaliatory conduct that Defendant directed at me.
7) Also, instead of conforming the claims to the evidence that was presented (as is permitted by FRCP 15), the

Court simply dismissed my claims.

8) Clearly my former counsel made some mistakes in certain aspects of the case or was frightened or perhaps even intimidated by the Court.
9) Also, the DOE presented what I will be able to show is false evidence related to my claims for discrimination related to the Regents exams, certain aspects of the 3020a disciplinary and sending me to the Rubber Room which in and of itself could be considered as improper discipline and further evidence of discriminatory practice.
10) Further the DOE interfered with my ability to present the evidence to show how the conduct was related to the claims that in June 2008 the Court determined would be permitted to proceed to trial.
11) The Court either misunderstood the evidence or made a mistake for which reconsideration is appropriate because even in the charging of the jury, the Court indicated that Defendants could be or could have been liable for discriminatory practices other than just age discrimination so long as they were related and there was evidence to support the claims, which there was.
12) And, the Court properly considered the evidence and did not make the mistakes of fact or law or errors for which this Motion is now necessary.
13) During the trial the Court failed to admit or misunderstood evidence related to the age related discrimination where only older tenured teachers were cited with alleged violations related to the regents exam and the younger teachers were not disciplined.

14) During the trial and in the presence of the jury, the Court indicated that there could be other motives,

such as race, besides age discrimination to explain Defendants conduct.

15) During the course of the trial, the Court severely limited the time for my presentation of evidence to two hours. In this way, the Court was not able to properly consider all the evidence and prevented me from presenting evidence related to age discrimination, similar past discriminatory conduct, the improper transfer to the Rubber Room as discipline and failed to conform the case to the evidence presented.

16) The Court failed to consider the evidence of the language used by Defendants and directed at me which language included words denoting age discrimination against me, the evidence of trumped up charges, directing / encouraging students to file verbal abuse charges against me, assaulting me without consequences, directing me to perform menial tasks, "rounding up" of me and others to be sent off to rubber room, the sending of AP's to deliver humiliating letters, use of demeaning and insulting language against me and other such as "the teacher's crazy". "delusional", "you're an awful teacher", "icon of the evils of experience" and other evidence related to adverse, discriminatory employment actions against me because of my age, seniority and tenure.

17) There was credible evidence of the discrimination through among other things (i) arbitrary removal of responsibilities; (ii) unfair assignment of larger or lower classes despite seniority; (iii) unfair scheduling that would impair health and cause further physical

disability; (iv) assignment of menial tasks: (v) withholding of textbooks; (vi) requirement to work extra or longer hours that further impacted disabilities; (vii) improper requirement to administer Spanish Regents without providing necessary resources; (viii) imposition of unrealistic work demands: (ix) punishment / retaliation for filing for grievances related to unfair schedule that impaired health. (x) creation of hostile work environment, (xi) unreasonably interfering with work, classroom management and permissible discipline of students and (xii) subjecting me to improper discipline by banishment to Rubber Room before discipline was ever determined.

18) The claims and evidence in my case related to discrimination based on my age, seniority, physical disabilities and my exercise of my rights to speak out against the system and the policies and practices implemented by the Defendant DOE. The evidence as presented in my complaint and the evidence that I was able to elicit at trial, included:

a) In the Spring of 2004, I requested and was granted a leave of absence as a result of a trimalleolar ankle fracture, a herniated disc and a bulged disc, making it extraordinarily difficult and painful to stand and/or to walk. I returned to teaching in September 2004. but continued to have extreme difficulty standing and walking for extended periods.
b) I was subjected to a discriminatory and retaliatory environment upon my return from the leave of absence in September 2004 and continuing to present.
c) Due to my disability I requested an accommodation to allow me to not stand and to not walk as much as before the onset of the disability. Defendant refused.

d) I was assigned harder tasks due to my physical disabilities, such as having to stand and to teach multiple consecutive periods that placed unfair stresses on me.
e) In January 2005, my requests for a reasonable accommodation were ignored, Defendants changed my schedule, assigned me to larger and lower level classes that had many students with well-known disciplinary problems;
f) In February 2005. I "grieved" the assignments, complained and spoke out against the discriminatory and harassing policies.
g) As a result of my grievance, complaints and speaking out against the discriminatory and harassing policies, Defendants retaliated and subjected me to more punishment.
h) I was subjected to mistreatment, and schedule and classroom assignment changes.
i) I was targeted for punishment, dismissal and subjected to excessive scrutiny and micromanagement.
j) I was given U-ratings and grouped with other senior, older teachers who were similarly discriminated against because of their age, senior and challenges to the Defendants policies.
k) The imposition of U-ratings gave Defendants the "excuse" to remove me from my normal assignments, imposition of schedules and duties that discriminated against me because of my age and physical disability/limitation, prevented me transferring to another school and refusal to promote me to any other position.
l) After being physically assaulted by a student, I received a discriminatory report in my personnel file in which I was accused of

verbally abusing the student who had physically assaulted me. The report was placed in my personnel file without notice or an opportunity to be heard and as a result of the report I was further discriminated.

m) I was re-assigned to the Rubber Room at 7th Avenue where I have remained for years. The Rubber Room itself is improper punishment, as it is a dangerous physical location, I am subjected to further discrimination due to my disability and the Defendants try to get me to quit due to my age, seniority and refusal to accept Defendants' discriminatory policies and practices that in my case were designed just to get me to quit.

19) There was more than adequate credible evidence to allow my claims to go to the jury. And the Court should have allowed my claims to go to the jury.

CONCLUSION

20) In view of the foregoing, I pray the Court grant my Motion for Reconsideration, Motion to Amend the Complaint to Conform to the Evidence, Motion to Relieve Me of the Order Dismissing My Claims, Motion to Restore my individual claims and for such other relief as is just and equitable.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANDREA SHAPIRO, et al., :

Plaintiffs, : 06 Civ. 1836 (JSR)

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-v- : MEMORANDUM

: ORDER

NEW YORK CITY DEPARTMENT OF :
MENT OF EDUCATION, et al., :

Defendants :

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JED S. RAKOFF, U.S.D.J.

Plaintiffs Gloria Chavez and Josefina Cruz, pro se, each individually move pursuant to Fed. R. Civ. P. 60(b) to vacate the Court's judgment as to certain of their claims, and to obtain various other forms of relief from the Court.

By way of background, this is an age and disability discrimination case brought by current and former teachers at the Graphics Communications Arts High School ("GCA") against the New York City Department of Education and GCA Principal Jerod Resnick. Prior to filing the instant motion, Chavez and Cruz were represented by counsel. Following discovery, defendants moved for summary judgment. At oral argument, the Court dismissed with prejudice the disability discrimination claim brought by plaintiff Cruz, holding that Ms. Cruz had failed to file an administrative charge with the EEOC within 300 days of the alleged discriminatory acts, a necessary condition precedent to bringing a claim pursuant to the Americans with Disabilities Act. See transcript 9/5/07 at 25. After the Court dismissed certain other claims and parties, the remaining claims by the remaining plaintiffs went to trial.

Appendix H

On September 17, 2008, after the close of evidence, the Court dismissed all remaining age discrimination claims brought by Ms. Cruz and by plaintiff Chavez, with the exception of Ms. Cruz's claim relating to her 2005 unsatisfactory rating ("U rating"), holding that the evidence presented at trial was "insufficient on its face to meaningfully support an inference of age discrimination" as to those claims. Transcript 9/17/08 at 1143. On September 19, 2008, a jury returned a verdict finding no liability as to Ms. Cruz's remaining age discrimination claim.

On November 5, 2008, plaintiffs Cruz and Chavez appeared with their attorney in open court, and requested leave to file post-trial motions. Plaintiffs' attorney, in turn, requested permission to withdraw as counsel as to these two plaintiffs, contending that there was no meritorious basis for any post-trial motions. The Court accordingly relieved counsel, and granted plaintiffs Cruz and Chavez a one-week adjournment to determine whether they desired to proceed pro se, or alternatively, to retain new counsel. See transcript 11/5/08. On November 12, 2008, plaintiffs Cruz and Chavez appeared again in open court, and, having not retained new counsel, requested leave to proceed pro se. The Court granted plaintiffs' request, see transcript 11/12/08, and the instant motions followed.

Rule 60(b), Fed. R. Civ. P., permits a trial court to relieve a party from a final judgment for a variety of reasons, including, inter alia, mistake, excusable neglect, newly discovered evidence, fraud, or "any other reason that justifies relief," id., but "only upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986). Because Ms. Chavez and Ms. Cruz bring these motions pro se, the Court construes their motions liberally, and interprets them "to raise the strongest arguments" they suggest. Pabon v. Wright, 459 F.3d 241, 248 (2d Cir. 2006) (citation omitted). Nevertheless, evidence in support of Rule 60(b) motions must be "highly convincing," Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6, 9 (2d Cir.

1987), and the resolution of such motions is left to "the sound discretion of the trial court." National Petrochemical Co. v. The M/T Stolt Sheaf, 930 F.2d 240, 244 (2d Cir. 1991).

Ms. Chavez first argues that her attorney made a number of errors in prosecuting this action that require vacatur, including, inter alia, failing to call certain witnesses to testify at trial, voluntarily dismissing Ms. Chavez's supervisor from this action, failing to introduce certain exhibits at trial, failing to ask certain questions of witnesses at tria making no effort to depose "expert witness[es] from the NYS Board of Regents," making certain strategic or tactical errors in presenting evidence at trial, and failing to promptly inform Ms. Chavez of certain court decisions. See Chavez Decl. ¶I 25-38; 65. These claims for relief are properly asserted under either Rule 60(b)(1), which provides for vacatur of judgment based on a showing of mistake or excusable neglect, or Rule 60(b)(6), which permits vacatur for "any other reason that justifies relief." Nevertheless, "[m)ere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b) (1) relief." Nemaizer, 793 F.2d at 62. Similarly, "[t]o be `extraordinary circumstances' for purposes of Rule 60(b)(6), a lawyer's failures must be so egregious and profound that they amount to the abandonment of the client's case altogether, either through physical disappearance, or constructive disappearance." Harris v. United States, 367 F.3d 74, 81 (2d Cir. 2004) (internal citations omitted).

Here, the errors complained of fall far short of the showing necessary to justify vacatur under either section. Indeed, they were not errors at all. As the Court had occasion to state on several occasions during the several years in which Ms. Chavez's counsel vigorously litigated this action, the quality of representation that Ms. Chavez (and Ms. Cruz)

received was nothing less than exemplary. Although Ms. Chavez may disagree with some of the tactical decisions made by her attorney in this action, she "cannot now avoid the consequences of the acts or omissions of [her] freely selected agent." Link v. Wabash R. Co., 370 U.S. 626, 633-634 (1962).

Ms. Cruz likewise argues that her "former counsel made some mistakes in certain aspects of the case," but fails to articulate any basis for her argument. Moreover, as indicated above, the argument is frivolous. Accordingly, Ms. Cruz's motion to vacate the judgment due to attorney mistake likewise must be denied.

Ms. Chavez and Ms. Cruz next allege certain errors supposedly made by the Court during the course of trial, presumably pursuant to Rule 60(b)(1), which permits vacatur on the basis of "mistake."

First, both plaintiffs argue that the Court improperly limited direct and cross-examination at trial, thus denying Ms. Chavez "equal time to testify or introduce important evidence," Chavez Decl. T 45, and "severely limit[ing" Ms. Cruz's testimony "to two hours." Cruz Decl. ¶ 15. As an initial matter, the Court observes that there is a "long line of cases making clear the authority of district judges to impose reasonable time limitations on trials." Latino Officers Ass'n v. City of New York, 99 Civ. 9568, 2003 U.S. Dist. LEXIS 17778, at *5-6 (S.D.N.Y. Oct. 8, 2003) (collecting cases); see Gasperini v. Ctr. for Humanities, 149 F.3d 137, 143 (2d Cir. 1998) (holding that the district court "acted within proper bounds in deciding to limit further exploration of [an] issue in order to avoid wasting time"). Moreover, it is well-established that "a trial judge has extensive discretion in controlling the scope and length of cross-examination." United States v. Kahn, 472 F.2d 272, 281 (2d Cir. 1973).

Here, the Court afforded plaintiffs ample opportunity to introduce evidence in support of their case, and indeed noted that it was "very hesitant to impose any time" constraints on the presentation of evidence. Transcript

9/10/08 at 420. The Court expressed concern, however, that counsel repeatedly failed to accurately predict the amount of time they would need to examine witnesses, and that counsel was wasting an inordinate amount of time with blatantly improper questions and cumulative, repetitive testimony. Id. at 420-21. In light of these concerns, the Court late: imposed a modest two-hour time limit on most witnesses' testimony, because such testimony generally related to discrete factual circumstances that did not cut across plaintiffs. Transcript 9/12/08 at 489. This limit did not apply, however, to witnesses such as defendant Resnick, whose testimony "cover[ed] the waterfront of many different events involving many different plaintiffs," nor to witnesses such as plaintiff Ferraro, the first witness to testify, because "there were a lot of background" issues to introduce to the jury. Transcript 9/12/08 at 489. There is no indication that either Ms. Chavez or Ms. Cruz were denied the opportunity to present any and all relevant evidence as to their claims. Plaintiffs' counsel had ample opportunity to examine both witnesses, and rigorously cross-examined defense witnesses concerning plaintiffs' claims. Accordingly, plaintiffs' motion in this respect is denied.

Second, Ms. Chavez complains that the Court did not permit a "key witness," Ms. Vasquez, to testify at trial. Chavez Decl. T5[46-47. The Court never made such a ruling, however. To the extent that plaintiffs' counsel made a strategic decision not to call Ms. Vasquez to testify, such a decision, as noted above, cannot form a basis for relief.

Third, both plaintiffs argue that the Court improperly dismissed their age discrimination claims relating to their transfer to the Regional Operation Center and their 2006 U ratings.[1] It is axiomatic in an age discrimination claim,

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[1] Ms. Cruz does not expressly challenge the Court's dismissal of her disability discrimination claim, although she notes at several points that her claim "related to discrimination based on" her "physical disabilities." Cruz

however, that the circumstances surrounding an alleged discriminatory action must "give rise to an inference of age discrimination."[2] Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir. 2001). Here, the evidence presented at trial was entirely bereft of even a scintilla of proof supporting an inference of age discrimination.' Ms. Chavez concedes as much by noting that "[n]o iota of evidence was presented by plaintiff's lawyer to support her claim." Chavez Decl. 91 32. Moreover, as the Court observed at trial, "the evidence is undisputed" that "Ms. Vazquez, who is only 33 years old, was treated identically" as Ms. Chavez and Ms. Cruz with respect to their transfer and 2006 U ratings. Transcript 9/17/08 at 1142; see Grady v. Affiliated Cent., 130 F.3d 553, 561 (2d Cir. 1997) (affirming dismissal of age discrimination claim, noting that "[t]he record is perhaps most remarkable for the presence

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Decl. ¶ 18. Similarly, Ms. Cruz does not appear to challenge the jury's verdict finding no liability on her age discrimination claim with respect to her 2005 U rating. In any event, Ms. Cruz has not presented any evidence or facts that would support overturning the Court's previous determination as to her disability discrimination claim, nor has Ms. Cruz presented any evidence warranting a reversal of the jury's verdict as to her remaining age discrimination claim.

[2] Indeed, to the contrary, plaintiffs' own testimony confirms that the adverse employment actions in question were taken without any reference whatsoever to plaintiff's age. See 9/15/05 Transcript at 700 (Chavez) ("Q: What is the reason you got an annual U rating? A: Because I failed to administer the oral component of the Spanish regents in January 2006"); 9/16/08 Transcript at 766 (Cruz) ("Q: Now, your failure to administer the January 2006 oral part of the regents wasn't the only [ ] reason you got a U rating in '05-'06, right? A: Right. Q: You testified you had two substantiated allegations of corporal punishment by verbal abuse, correct? A: Right.").

of affirmative evidence . . . that older and younger trainees were in fact treated the same"). The only possible basis for inferring any alleged difference in treatment between plaintiffs and Ms. Vazquez was an overheard conversation between Ms. Vazquez and an administrator with no material connection to defendant Resnick or his subordinates, that was insufficient on its face to meaningfully support any inference of age discrimination. In short, because Ms. Chavez and Ms. Cruz have failed to point to any material facts or laws purportedly overlooked by the Court, plaintiffs' Rule 60(b)(1) motion must be denied. See Fetik v. New York Law School, 97 Civ. 7746, 1999 WL 459805, at *4 (S.D.N.Y. June 29, 1999) (declining to provide relief under Rule 60(b)(1) where movant failed to show "any material issue of fact or law overlooked by the Court").

Ms. Cruz also moves pursuant to Local Civil Rule 6.3 for reconsideration of the Court's order dismissing her age discrimination claim relating to her transfer and 2006 U rating. Motions for reconsideration "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); S.D.N.Y. Local Civil Rule 6.3 (motions for reconsideration must include "a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked"). Here, as noted above, Ms. Cruz has failed to point to any controlling decisions or facts that the Court overlooked in dismissing Ms Cruz's claim. Accordingly, Ms. Cruz's motion must be denied.

Ms. Chavez further contends that the Court erred in failing to "conform the claim to the evidence," Chavez Decl. T 42, and Ms. Cruz similarly argues that the Court improperly dismissed her claims "[i]nstead of permitting an Amendment of [her] complaint in accordance with [Fed. R. Civ. P. 15]." Cruz Mem. at 3. Ms. Chavez's and Ms. Cruz's submissions do not expressly indicate what claims they seek to add to the

already thrice-amended complaint.[3] Even if they did so indicate, plaintiffs' motions must be denied, because the only issue actually tried was whether or not plaintiffs were discriminated against because of their age, and any allusion to other issues during the course of this litigation was, at best, incidental. Accordingly, plaintiffs' request to amend their pleadings falls far outside the scope of Rule 15. See Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1086 (2d Cir. 1977) ("[t]he purpose of Rule 15(b) is to allow the pleadings to conform to issues actually tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the record").

Both plaintiffs also ask the Court to consider certain pieces of evidence that, although never introduced at trial, purportedly support their age discrimination claims. This evidence includes, inter alia, evidence that Ms. Chavez was "treated differently than Judith Silverman, Anita Olejnick and a long list of younger teachers in our school," Chavez Decl. T 55, 58; evidence that "[t]hree white younger teachers were hired to replace" Ms. Chavez and her colleagues, .1 56; proof that defendant Resnick made "disrespectful remarks" that made Ms. Chavez feel that she was aging, id. TT 59-60; and "evidence of the language used by Defendants and directed at [Ms. Cruz]." Cruz Mem. ¶ 16;[4] see also Chavez

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[3] Ms. Chavez contends that she "complained of discrimination because of ethnicity/national origin," and that the such claims were improperly dismissed at summary judgment. See Declaration of Gloria S. Chavez, at 2, 8-9. But no plaintiff, including Ms. Chavez, ever raised such claims, nor were such claims ever included in the thrice-amended Complaint or raised during the course of this litigation. See Compl., First Amended Compl., Second Amended Compl., Third Amended Compl. Accordingly, the Court cannot now, at this late stage of the litigation, consider Ms. Chavez's purported allegations of discrimination based on her ethnicity/national origin. See Miller v. Norton, 04 Civ. 3223, 2008 U.S. Dist. LEXIS 34688, at *16 (E.D.N.Y. Apr. 28, 2008) (holding that "an entirely new claim which was never pursued" in the lawsuit w s far outside the scope of Rule *60(b)*).

[4] Ms. Cruz argues that the Court "failed to consider" such evidence, Cruz Mem. ¶ 16, but no such evidence was ever presented at trial.

Decl. ~[Q 68-72. In order to successfully vacate a judgment based on "new evidence" pursuant to Rule 60(b)(2), however, plaintiffs must present evidence that is "`truly newly discovered or ... could not have been found by due diligence.'" United States v. Potamkin Cadillac Corp., 697 F.2d 491, 493 (2d Cir. 1983) (citation omitted). Thus, evidence that was in plaintiffs' possession before judgment was rendered is not "newly discovered," and does not entitle plaintiffs to relief. Id.; see Patel v. Lutheran Medical Ctr., 775 F. Supp. 592, 596 (E.D.N.Y. 1991). The evidence referenced in plaintiffs' submissions cannot in any way be viewed as "newly discovered," and appears to relate entirely to incidents that allegedly occurred long before the commencement of the trial in this action. Plaintiffs' counsel's failure to introduce this and other evidence at trial maybe characterized by Ms. Chavez and Ms. Cruz as a strategic misstep (athough the Court does not agree with that characterization), but in any event, as noted above, cannot afford a basis for vacatur at this stage. Accordingly, plaintiffs' motion in this respect must be denied.[5]

Finally, Ms. Chavez references a variety of facts that are (arguably) unrelated to the instant action, including a description of the circumstances surrounding her Section 3020-a disciplinary hearing, and Ms. Cruz presents a variety of additional arguments in support of her motion, including that the Court's judgment is void pursuant to Fed. R. Civ. P. 60(b)(4) and that she was denied due process of law. The Court has carefully considered these and all other remaining facts and arguments raised in plaintiffs'

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[5] Ms. Chavez also attaches to her declaration a variety of exhibits, including a Notice of Right to Sue dated November 19, 2008, various newspaper articles regarding defendant Resnick, a written statement by Ms. Chavez, a Termination letter dated October 30, 2008, a list of "hostile" and "friendly" witnesses, and correspondence from the Special Commissioner of Investigation for the New York City School District. None of the exhibits attached to Ms. Chavez's declaration, however, provide a basis for vacating the Court's judgment, and a good number of them are entirely irrelevant to the subject matter of Ms. Chavez's claims in this action.

submissions, and holds that none of them warrant disturbing the Court's judgment.

Accordingly, Ms. Chavez' and Ms. Cruz's post-trial motions are hereby denied in their entirety.[6]

SO ORDERED.

/s/ JED S. RAKOFF

Dated: New York, New York
December 31, 2008

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[6] As for other post-trial motions, on October 22, 2008 plaintiffs Ferraro, Friedline, and Maroni moved for reasonable attorneys' fees and costs. The Court will make a determination as to these motions following the resolution of all appellate practice in this action. On the consent of all parties, all other remaining post-trial motions have been withdrawn, and are hereby denied as moot. Accordingly, the Clerk of the Court is directed to close document numbers 77, 80, 84, 85, and 92, and to close the Court's docket for this case.

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☑ EEOC

CHARGE NUMBER: 520-2006-01280

and EEOC

State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): MS. JOSEFINA CRUZ

HOME TELEPHONE (Include Area Code):

STREET ADDRESS: 301 CATHEDRAL PARKWAY, APT #1J

CITY, STATE AND ZIP CODE: NY NY 10026

DATE OF BIRTH: 1/31/47

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: NYCBOE

NUMBER OF EMPLOYEES, MEMBERS: 500+

TELEPHONE (Include Area Code): 212-374-0200

STREET ADDRESS: 52 Chambers St

CITY, STATE AND ZIP CODE: NY NY 1007

COUNTY: NY

NAME:

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS:

CITY, STATE AND ZIP CODE:

COUNTY:

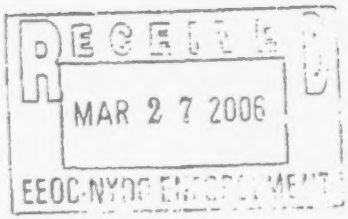
CAUSE OF DISCRIMINATION BASED ON (Check appropriate boxes.)

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☒ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE EARLIEST/LATEST

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*



I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY - (When necessary for State and Local Requirements)
I declare under penalty of perjury that the foregoing is true and correct.	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
Date: 3/16/2006 Charging Party (Signature)	SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year) 3/16/2006

EEOC FORM 5 (REV. 2/01)

07/06/05 WED 10:38 FAX 1718 331 1227 Joseph Collado 008

EEOC Form 161 (3/98)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: **Josefina Cruz**
301 Cathedral Street
Apt. 1J
New York, NY 10026

From: **New York District Office - 520**
33 Whitehall Street
5th Floor
New York, NY 10004

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
520-2006-01280	**Hazel C. Stewart, Supervisory Investigator**	**(212) 336-3776**

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability as defined by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.

☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You were given 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)*

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this Notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

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On behalf of the Commission

Enclosure(s)

Spencer H. Lewis, Jr.,
Director

MAY 05 2006

(Date Mailed)

cc: **Director, Human Resources**
NYC BOARD OF EDUCATION
52 Chambers Street
New York, NY 10007

Peter Ronai, Esq.
Ronai & Ronai
199 Main Street
White Plains, NY 10601

CHARGE OF DISCRIMINATION

AGENCY	CHARGE NUMBER
This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.	FEPA
	X EEOC 520-2006-01280
State or local Agency, if any	and EEOC

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Ms. Josefina Cruz	212-222-0371
STREET ADDRESS CITY, STATE AND ZIP CODE	DATE OF BIRTH
301 Cathedral Parkway, #1J, New York, New York 10026-4508	

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
New York City Board of Education	500+	212-374-0200
STREET ADDRESS CITY, STATE AND ZIP CODE		COUNTY
52 Chambers Street, New York, NY 10007		New York

NAME	TELEPHONE NUMBER (Include Area Code)
STREET ADDRESS CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))												DATE DISCRIMINATION TOOK PLACE EARLIEST (ADEA/EPA) LATEST (ALL)
		RACE		COLOR		SEX		RELIGION	X	AGE		Earliest: February 2004 Latest: Present
		RETALIATION		NATIONAL ORIGIN		DISABILITY		OTHER (Specify)				
												CONTINUING ACTION

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THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s))*:

1. My date of birth is January , 1947, and I am currently 58 years of age. I was hired by the New York City Board of Education (now referred to as the "New York City Department of Education") in 1994, and have worked as a teacher of Spanish at M625, Graphic Communication Arts High School ("GCAHS") since September 2003. I am currently still employed as a Spanish teacher at GCAHS in Manhattan, New York.
2. Prior to my assignment at GCAHS, I had received only Satisfactory annual performance ratings and evaluations. During my first year at GCAHS (2003-2004 school year), I worked only for the Fall term, and was granted a Leave of Absence for Restoration of Health for the majority of the Spring 2004 semester, as a result of an unsuccessful knee surgery. My leave concluded in July 2004.
3. I have been the victim of repeated hostile and discriminatory treatment by the administration at the school because of my age. Since my return from my medical leave in September 2004, I have always been assigned to teach three periods in a row. At times, these consecutive classes were located in different rooms, on different floors, and required me to teach in different languages. In the Spring of 2005, I was again assigned to teach three periods in a row, as well as teach two different subjects in two different languages in the same classroom, and I was assigned my lunch period during a non-lunch time, i.e., during period 4 when no food was available in the lunchroom. The administration at GCAHS failed to issue such "3 period teaching assignments" on a rotating basis to other staff members. In other words, teachers with less seniority received more favorable teaching schedules than I. Every other teacher in the Spanish department has historically been assigned to teach all of his or her classes on the same floor, if not in the same room, and all have two non-teaching periods in a

row i.e., lunch period and preparatory period). Based on the unfairness of the schedule to which I was assigned and its effect on my health and well being, in February 2005, I grieved these assignments.

4. After I filed my grievance regarding my teaching schedule, I was subjected to continuing and increased harassment by the administration: throughout February, 2005, my schedule and classrooms were changed a number of times and I was not provided with a locker or desk space in the rooms in which I was teaching. Additionally, the locker that I had been previously using was opened outside of my presence and other staff members were assigned access to it, without notice to me. The administration began to scrutinize my service in a discriminatory fashion. My supervisors appeared for unannounced, informal observations of a punitive nature. During the school year, administrators appeared for such unannounced observations approximately 24 times between the beginning of February, 2005 and the end of March, 2005. Unlike formal observations conducted pursuant to the applicable collective bargaining agreement, there was no pre-observation conference and no notice of these "observations". Additionally, Judith Silverman, the Assistant Principal for Science and Foreign Language, repeatedly undermined my authority with the students by, for example, overriding disciplinary consequences that I imposed on misbehaving students.
5. At the close of the 2004-2005 school year, the first full year that I worked at GCAHS, my annual performance rating was "Unsatisfactory". During this year, I was only formally observed 3 times. All of the observations were conducted by A.P. Silverman. In her first observation report, she praised my pedagogical skills and rated my lesson satisfactory. The following 2 observations were conducted within a six-week period of time, and both reports characterized my lessons as unsatisfactory. Contrary to contractual requirements, A.P. Silverman failed to conduct

pre-observation conferences prior to observing these lessons. Furthermore, the lessons A.P. Silverman observed were Spanish lessons. AP Silverman neither speaks Spanish nor is certified or licensed to teach Spanish.

6. Prior to A.P. Silverman's observations of these lessons, I wrote to her to express my concern based on the lack of level-appropriate Spanish text books which were provided to me. In my opinion, the lack of materials provided by the school directly impaired the students' ability to learn, violated the City and State mandates regarding instructional materials, and required me to expend extensive time, energy and funds to locate, copy and often times, create, my own level-appropriate instructional materials. In May 2005, AP Silverman provided me with level-appropriate Spanish books, claiming that they had been in a closet all along.
7. At the start of the current school year, in September 2005, I again received an inequitable schedule: I was assigned to teach three periods in a row at the end of the day, teaching three different tracks and levels. I grieved this assignment and appeared at a Step II hearing on September 16, 2005 to air may complaints. The notice of hearing was sent to the wrong union representative, and therefore I was alone and unrepresented at this grievance hearing. In an effort to demonstrate my good faith and consistent with the Hearing Officer's recommendation, I agreed to withdraw my grievance in exchange for a promise that Principal Jerod Resnick would cease and desist from assigning me these types of unfair schedules in the future (i.e., effective February 2006). The Hearing Officer in this matter was an employee of the New York City department of Education. Although my withdrawal of the grievance was in writing, the Principal's promise was not. To date, I still am assigned to teach three consecutive periods.
8. On September 26 and December 5, 2005, I was observed again by A.P. Silverman. Sime Lantigua, another Assistant

Principal, from a different department, who is apparently fluent in Spanish, was also present with A.P. Silverman for the September 26, 2005 lesson. Afterwards, Mr. Lantigua told me and other teachers that my lesson was satisfactory. Ultimately, A.P. Silverman rated the September 26th lesson as unsatisfactory. I am still awaiting the rating regarding the December 5th lesson.

9. I have also been subjected to repeated hostile and discriminatory comments about my age by administrators at GCAHS. On or about February 7, 2005, Principal Resnick called a departmental meeting regarding my complaint about the scheduling for the Spring 2005 term. During this meeting, I stated that no school would give such a schedule to a teacher that it wanted to retain. I also stated that my schedule was punitive. A. P. Silverman responded, "It was meant to be." At that same meeting, Principal Resnick asked me how long I had been teaching. I did not question or dispute either of these comment.
10. On or about November 21, 2005, a student in my class threw papers at me and physically assaulted me. A few days after this incident, I was notified that the student alleged I had verbally abused him, by referring to him as "retarded". I made no such comment. On or about November 30, 2005, Principal Resnick met with me to question me regarding this matter. A few days later, Principal Resnick wrote me that based on the student's and other witness statements, he had concluded that I had engaged in verbal abuse. Subsequently, I learned from reliable sources that several students had told the Dean's office and, in certain instances, had told the Principal directly, that I had never referred to the student as "retarded". I believe that Principal Resnick's investigation was biased and motivated by age discrimination. Principal Resnick placed the letter concluding I had engaged in verbal abuse in my personnel file. According to the revised provisions of the collective bargaining agreement, I am precluded

from grieving such a letter in the file. The issuance of the unsatisfactory ratings virtually eliminates any chance I would have at attaining a transfer to a neutral school.

11. I am aware of other teachers who were or presently are employed at GCAHS and who have suffered similar discriminatory actions. Many of these teachers bargained for a "Satisfactory" annual performance rating from Principal Resnick, and in exchange for such rating the teachers transferred out of the school. I believe most of the affected teachers were members of the English and Science/Foreign Language departments.
12. It is my belief that I am and have been a victim of discrimination based upon my age—I am 58 years old. I believe this is in violation of the Age Discrimination in Employment Act and that I and a class of similarly situated individuals are discriminated against on the basis of age. I hereby file this charge on my behalf and on behalf of all other pedagogical employees of the New York City Board of Education who are at least forty years o age and subject to disparate treatment and/or impact because of their age.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY - (When necessary by State and Local Requirements)
	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
I declare under penalty of perjury that the foregoing is true and correct.	SIGNATURE OF COMPLAINANT
	SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)
Date Charging Party (signature)	
EEOC FORM 5 (Test 10	

Greats Esther

From: Resnick Jerod (02M625)

Sent: Friday, August 25, 2006 7:24 PM

To: Greats Esther

Subject: RE: Accommodation Request for Josefina Cruz (Revised Request)

Ms Cruz was reassigned to the regional office in June 2006.

From: Greats Esther

Sent: Fri 8/25/2006 2:01 PM To; Resnick Jerod (OZM625)

Subject; Accommodation Request for Josefina Cruz (Revised Request)

Dear Mr. Resnick:

Ms. Cruz has requested elevator use and No escort duties on stairs. Ms. Cruz accommodation requests were deemed medically warranted by the Medical, leaves & Benefits Office.

Mr. Resnick before a final determination can be rendered we are awaiting your response. Will you be able to accommodate Ms. Cruz?

Esther Greats
Medical, Leaves & Benefits Office
8/29/2006

Cruz 542

Appendix J

JOSEFINA CRUZ
301 Cathedral Parkway #1J
New York, N. Y. 10026
(212) 222-0371 Cell. (212) 731-4589

August 29, 2008

ISC Human Resources Deputy Director
New York City Department of Education
Integrated Service Center (ISC)
333 Seventh Avenue
New York, NY

Dear Deputy Director:

Since Room 801 was outfitted with Steelcase Domino chairs, some reassigned teachers have suffered from pain and swelling in legs and back.

I am hereby requesting the following accommodations:

A padded chair that is ergonomically sound and appropriate for all-day sitting.
A flexible schedule due to a more difficult commute since reassigned in this Center.

I have a medical history of pain and swelling in my legs after a trimalleolar ankle fracture, an arthroscopy and disc problems.

Thank you for your attention to this letter.

Very truly yours,

Josefina Cruz